Circuit and District Judges Midwinter Conference
January 19, 2006

Circuit and District Court Sentencing

Prepared by:
Lynda Flynt, Executive Director
Rosa Davis, Chief Assistant Attorney General

Alabama Sentencing Commission
300 Dexter Avenue
Montgomery, AL 36104
(334) 954-5096
http://sentencingcommission.alacourt.gov

TABLE OF CONTENTS

PRINCIPLES OF SENTENCING

"The sentence imposed in each case should call for the least restrictive sanction that is consistent with the protection of the public and the gravity of the crime. In determining the sentence, the court should evaluate the crime and its consequences, as well as the background and record of the defendant and give serious consideration to the goal of sentencing equality and the need to avoid unwarranted disparities.

"Judges should be sensitive to the impact their sentences have on all components of the criminal justice system and should consider alternatives to long-term institutional confinement or incarceration in cases involving offenders whom the court deems to pose no serious danger to society." **Rule 26.8 Alabama Rules of Criminal Procedure**

I. Alabama General Penalty Provisions and Enhancements

A. Felonies § 13A-5-6 and § 13A-5-11

Current Offense	Penalty	Minimum Penalty if Firearm/Deadly Weapon Used/Attempted	Minimum Mandatory Child Sex Offenders*
Class A Felony	10-99 years or life in state penitentiary Fine up to $20,000	20 years imprisonment	20 years plus 10 years post-incarceration supervision (part of sentence)
Class B Felony	2-20 years imprisonment**. Fine up to $10,000	10 years imprisonment	10 years imprisonment
Class C Felony	1 (+1 day) - 10 years imprisonment*. Fine up to $5,000.	10 years.	

*** Sex Offenses involving a child victim under 12 years of age and child pornography offenses involving children under the age of 17.**
**** Imprisonment of 3 years or less can be ordered to be served in the county jail or penitentiary. Section 15-18-1(b) *Code of Alabama* 1975.**

B. Misdemeanors & Violations - § 13A-5-7, § 13A-5-12 and § 11-45-9

Offense	Imprisonment	Fine
Class A	**Not to exceed 1 year**	**Not more than $2,000***
Class B	**Not to exceed 6 months**	**Not more than $1,000***
Class C	**Not to exceed 3 months**	**Not more than $500***
State Violation	**Not to exceed 30 days**	**Not more than 200***
Municipal Ordinance Violation § 11-45-9	**Not to exceed 6 months (Except for DUI offenses where maximum is one year imprisonment or hard labor**	**Not to exceed $500 (Except for DUI where maximum fine is $5,000)**

*or any amount not exceeding double the pecuniary gain to the offender or loss to the victim cause by the commission of the offense.

C. Enhancements for Prior Felony Conviction History (Application of §13A-5-9, Habitual Felony Offender Act).

Current Offense	No Prior Felony Convictions	One Prior Felony Conviction	Two Prior Felony Convictions	Three+ Prior Felony Convictions
Class A Felony	10-99 years or life in state penitentiary. Fine up to $20,000.	15-99 years or life in state penitentiary. Fine up to $20,000.	Life imprisonment or any term of years not less than 99 years. Fine up to $20,000.	***No prior Class A Felony convictions:*** Mandatory imprisonment for life or life imprisonment without possibility of parole. Fine up to $20,000. ***One or more prior Class A Felony convictions:*** Mandatory imprisonment for life without possibility of parole. Fine up to $20,000.
Class B Felony	2-20 years imprisonment*. Fine up to $10,000.	10-99 years or life in state penitentiary. Fine up to $20,000.	15-99 years or life in state penitentiary. Fine up to $20,000.	Minimum of not less than 20 years or life imprisonment. Fine up to $20,000.
Class C Felony	1 (+1 day) - 10 years imprisonment*. Fine up to $5,000.	2-20 years in state penitentiary. Fine up to $10,000.	10-99 years or life in state penitentiary. Fine up to $20,000	15-99 years or life in state penitentiary. Fine up to $20,000.

* ***Imprisonment of 3 years or less*** can be ordered to be served in the county jail or penitentiary. Section §15-18-1(b) *Code of Alabama* 1975.

D. Enhancements for Specific Offenses

Statute	Offense	Enhancement
§13A-5-6	Firearm Enhancements (General)	Class A: Minimum 20 years Class B or C: Minimum 10 years
§13A-5-6 (4) &(5)	Child Sex Offenses	Class A: Minimum 20 years Class B: Minimum 10 years
§13A-5-13	Hate Crimes	Class A: 15 years Class B: 10 years Class C: 2 years
§13A-6-130	Domestic Violence 1st Degree -- 2nd and subsequent	1 year without possibility of probation, parole, or good time. If committed in violation of a protection order: Minimum doubled without possibility of probation, parole, or good time.
§13A-6-131	Domestic Violence 2nd Degree -- 2nd and subsequent	6 months without possibility of probation, parole, or good time. If committed in violation of a protection order: Minimum doubled without possibility of probation, parole, or good time.
§13A-10-152	Terrorism	Murder: Death Class A other than murder: Life without parole Class B: Class A (10-99 years/life) Class C: Class B (2-20 years)
§13A-11-60	Possession & sale of brass or steel teflon-coated handgun ammunition	Additional consecutive punishment of 3 years in the penitentiary.
§13A-12-231(13)	Firearm During Drug Trafficking	+ 5 years §13A-12-231 or HFOA, whichever greater
§32-5A-191	Misdemeanor DUI Note: Any person convicted of driving under the influence of alcohol or controlled substance more than once in a 5 year period "shall have his/her motor vehicle registration for all vehicles owned by the repeat offender suspended by the Alabama Department of Revenue for the duration of the license suspension/revocation period, unless such action would impose an undue hardship to any individual, not including the repeat offender, who is completely dependent on the motor vehicle for necessities of life, including any family member of the repeat offender and any co-owner of the vehicle.	1st – Imprisonment not more than 1 year Fine $600 but not more than $2,100* 90 days driver's license suspension 2nd (within five years) Not more than 1 year imprisonment *Mandatory Imprisonment for 5 days* *or* *Not less than 30 days community service* Fine $1,100 and not more than $5,100* 1 year revocation of driver's license 3rd Not less than 60 days but not more than 1 year (minimum mandatory of 60 days) Fine $2,100 and not more than $10,100* 3 year revocation of driver's license* *Must also refer to CRO program*

§32-5A-191(h)	Felony DUI	One year and one day, or 10 days mandatory imprisonment in county jail if enrolled and completes an approved chemical dependency program. Fine of $4,100 but not more than $10,100 5 year revocation of driver's license HFOA does not apply §32-5A-191 (h)
§32A-5A-191(n)	DUI with passenger under 14 years of age	Double minimum punishment.
§13A-8-51(2)	Pharmacy Robbery	Hard labor for not less than 10 years and not eligible for parole, probation, or suspension of sentence.
§13A-6-130	Enticing a child to enter a vehicle, house, etc. for immoral purposes-- 2nd and subsequent	6 months without possibility of probation, parole, or good time.
§15-22-27.1	Repeat felony offender of serious physical injury offenses – subsequent conviction within 5 years of murder, rape, robbery, or assault with a deadly weapon (or attempts) resulting in serious physical injury.	No possibility of parole.
§15-23-27.2	Two Time Class A felony – Life without Parole	Repealed – Follow HFOA
§15-22-27.3	Child Sex Offenders Committing Class A or B Felony	No possibility of parole (*but see* split statute as amended regarding B felonies)
§13A-12-215	Selling, furnishing controlled substance to child (under 18)	Class A Felony (10-99 yrs/life.). Cannot be suspended or probated.
§13A-12-250	Drug sale within 3 mile radius of school	Additional 5 years imprisonment. (If split, can suspend – *see* Soles v. State, 820 So.2d 163 (Ala.Crim.App. 2001)
§13A-12-270	Drug sale within 3 mile radius of housing project	Additional 5 years imprisonment. (If split, can suspend – *see* Soles v. State, 820 So.2d 163 (Ala.Crim.App. 2001)
§13A-12-233	Drug trafficking enterprise	**1st conviction**: 25 yrs. min. up to & inc. life w/o parole and fine of no less than $50,000 nor more than $500,000. **2nd conviction:** mandatory term of life w/o parole and fine not less than $150,000 nor more than $1 million.
§13A-12-231(13)	Drug trafficking while in possession of firearm	Additional 5 years not subject to suspension or probation & mandatory $25,000 mandatory fine. *Carter v. State*, 812 So.2d 391 (Ala.Cr.App. 2001)
§13A-12-231	Trafficking Cannabis: In excess of one kilo or 2.2 pounds but less than 100 pounds	Minimum 3 years and $25,000 fine.

§13A-12-231	Trafficking Cannabis: In excess of 100 pounds but less than 500 pounds	Minimum 5 years and $50,000 fine.
§13A-12-231	Trafficking Cannabis: In excess of 500 pounds but less than 1,000 pounds	Minimum 15 years and $200,000 fine.
§13A-12-231	Trafficking Cannabis: In excess of 1,000 pounds	Life imprisonment without parole
§13A-12-231	Trafficking Opium, Heroin & Lysergic Acid Diethylamide: 4 grams or more but less than 14 grams	Minimum 3 years and $50,000 fine.
§13A-12-231	Trafficking Opium, Heroin & Lysergic Acid Diethylamide: 14 grams or more but less than 28 grams	Minimum 10 years and $100,000 fine.
§13A-12-231	Trafficking Opium, Heroin & Lysergic Acid Diethylamide: 28 grams or more but less than 56 grams	Minimum 25 years and $500,000 fine.
§13A-12-231	Trafficking Opium, Heroin & Lysergic Acid Diethylamide: 56 grams or more	Life imprisonment without parole.
§13A-12-231	Trafficking Phencyclidine or mixture: 4 grams or more, but less than 14 grams	Minimum 3 years and $50,000 fine.
§13A-12-231	Trafficking Phencyclidine or mixture: 14 grams or more, but less than 28 grams	Minimum 10 years and $100,000 fine.
§13A-12-231	Trafficking Phencyclidine or mixture: 284 grams or more, but less than 56 grams	Minimum 25 years and $500,000 fine.
§13A-12-231	Trafficking Phencyclidine or mixture: 56 grams or more	Life imprisonment without parole.
§13A-12-231	Trafficking Methaqualone: 1,000 but less than 5,000 pills	Minimum 3 years and $50,000 fine.
§13A-12-231	Trafficking Methaqualone: 5,000 but less than 25,000 pills	Minimum 10 years and $100,000 fine.
§13A-12-231	Trafficking Methaqualone: 25,000 but less than 100,000 pills	Minimum 25 years and $500,000 fine.
§13A-12-231	Trafficking Methaqualone: 100,000 or more pills	Life imprisonment without parole.
§13A-12-231	Trafficking Hydromorphone: 500 but less than 1,000 pills	Minimum 3 years and $50,000 fine.
§13A-12-231	Trafficking Hydromorphone: 1,000 but less than 4,000 pills	Minimum 10 years and $100,000 fine.

§13A-12-231	Trafficking Hydromorphone: 4,000 but less than 10,000 pills	Minimum 25 years and $500,000 fine.
§13A-12-231	Trafficking Hydromorphone: 10,000 or more pills	Life imprisonment without parole.
§13A-12-231	Trafficking cocaine or mixture, methylenedioxy amphetamine or mixture, methoxy ethylenedioxy amphetamine or mixture, amphetamine or mixture, methamphetamine or mixture: 28 grams but less than 500 grams	Minimum 3 years and $50,000 fine.
§13A-12-231	Trafficking cocaine or mixture, methylenedioxy amphetamine or mixture, methoxy ethylenedioxy amphetamine or mixture, amphetamine or mixture, methamphetamine or mixture: 500 grams but less than one kilo	Minimum 10 years and $100,000 fine.
§13A-12-231	Trafficking cocaine or mixture, methylenedioxy amphetamine or mixture, methoxy ethylenedioxy amphetamine or mixture, amphetamine or mixture, methamphetamine or mixture: one kilo but less than 10 kilos	Minimum 25 years and $500,000 fine.
§13A-12-231	Trafficking cocaine or mixture, methylenedioxy amphetamine or mixture, methoxy ethylenedioxy amphetamine or mixture, amphetamine or mixture, methamphetamine or mixture: 10 kilos or more.	Life imprisonment without parole.
§13A-12-231(12)	Habitual offenders convicted of drug trafficking	Sentence provided in drug statute or HFOA, whichever is greater
§13A-12-231(12)	Minimum mandatory sentence for drug trafficking exceptions	Mandatory minimum term of imprisonment prescribed under Drug Trafficking Act or 15 years, whichever is less. Reduction is authorized for a defendant sentenced to any term except life imprisonment without parole, if (s)he provides substantial assistance in the arrest or conviction of any accomplices, accessories, co-conspirators, or principals. Motion must be made by district attorney; a judge may not reduce or suspend a sentence *ex mero moto*.

II. Punishment Generally

Section 15-18-1(a), Code of Alabama 1975 provides that "[t]he only legal punishments, besides removal from office and disqualification to hold office, are fines, hard labor for the county, imprisonment in the county jail, imprisonment in the penitentiary, which includes hard labor for the state, and death.
§ 15 -8-1

A. Place of Imprisonment

Imprisonment in Penitentiary or County Jails - § 15-18-1
Imprisonment or hard labor ***more than 12 months but not more than 3 years*** – judge may sentence to **confinement in the county jail**, **hard labor for the county** ***or*** imprisonment in the penitentiary.

Period of Imprisonment in penitentiary/hard labor for the county ***for more than 3 years*** – Imprisonment **must be in the penitentiary**.

B. Sentence Types

1. Multiple Sentences: How Served

The following types of sentences are utilized in Alabama:

Consecutive: Two or more sentences that are served at separate times, in sequence. One begins when the other ends. For example if a defendant receives consecutive sentences of 10 years and 5 years, the total amount of incarceration is 15 years.

Multiple sentences run consecutively, unless otherwise ordered. Rule 26.12 of the Alabama Rules of Criminal Procedures provides that "separate sentences of imprisonment imposed on a defendant for two or more offenses shall run consecutively, unless the judge at the time of sentencing directs otherwise, whether they are charged in the same charging instrument or by separate charging instruments." The rule further provides that previously imposed consecutive sentences may be modified at any time to run concurrently by the court issuing a nunc pro tunc order.

Concurrent: Two or more sentences which are served at the same time, simultaneously. For example if a defendant is sentenced to serve concurrent sentences of 20 years and 5 years, the total imprisonment is 20 years. When a subsequent sentence is run concurrent with an existing sentence then the two sentences overlap, and would not necessarily end at the same time. Good time is computed on each case separately and then the period of longest incarceration governs for establishing release date.

Coterminous: A sentence that ends at the same time as the one the defendant is now serving. A sentence that terminates upon completion of the inmate's other sentence. The effect is to accord retroactive effect to subsequent sentence, basically making the sentence run concurrent and commending at a date prior to the time the sentence is imposed.

Example: A defendant that has served 6 years of a 10 year sentence is subsequently convicted and sentenced to another 5 years to be served coterminous with his current sentence. The defendant will complete both sentences in 4 years, since they both end at the same time. If the second sentence was concurrent, the two sentences would overlap and the defendant would be required to serve and additional year for a total of 5 years.[1]

2. Straight Probation

For any defendant whose punishment is fixed at 15 years or less,[2] the sentencing judge is authorized to suspend the execution of the sentence and place the defendant on probation or "impose a fine within the limits fixed by law and also place the defendant on probation." §15-22-50, *Code of Alabama 1975*

5 Year Limitation for Felons

Although the court determines the period of probation or suspension of execution of the sentence, no defendant convicted of a felony may be placed on straight probation for a period exceeding five (5) years. § 15-22-54

2 Year Limit Applies to Misdemeanor Convictions

The maximum probation period of a defendant guilty of a misdemeanor cannot exceed tow years. §15-22-54

3-Year Limitation Applies to Youthful Offenders

Pursuant to § 15-19-6, the maximum period of probation that may be required of a defendant granted youthful offender status is three years. The Alabama Supreme Court has held that trial courts cannot impose consecutive probationary sentences that would contravene this limitation. *Jackson v. State,* 415 So.2d 1169 (Ala. 1994).

---

[1] Although "coterminous" sentences are not mentioned in the Code or Criminal Rules of Procedure, this type of sentence has been negotiated in plea agreements and imposed by some trial courts.

[2] Alabama's Split Sentence Act (§ 15-18-8) was amended in 2000 to apply to persons sentenced to more than 15 years but not more than 20 years imprisonment, with the authorized sentence of no less than 3 and nor more than 5 years confinement in a prison, jail-type institution or treatment institution, with the remainder of the sentence suspended. Section 15-22-50 relating to straight probation (with a maximum term of supervision for felony offenders 5 years), which excluded defendants sentenced to death or imprisonment in the penitentiary for more than 15 years. was *not* amended and continues to include these restrictions.

3. Suspension of Sentence – General Probation Statute - § 15-22-50

Only applicable to defendants convicted and sentenced to imprisonment for not more than 15 years. Section 15-22-50 authorizes circuit and district courts to suspend the execution of a sentence and place a defendant on probation: "*[T]he court, after a plea of guilty, after the returning of a verdict of guilty by the jury or after the entry of a judgment of guilty by the court, may suspend execution of sentence and place the defendant on probation, or may impose a fine within the limits fixed by law and also place the defendant on probation."*

4. Split Sentence - §15-18-8

a. Generally

Section 15-18-8, referred to as the Split Sentence Act, is a creation of the legislature intending to give judges discretion to avoid the potentially harsh consequences of the Habitual Felony Offender Act. However, the Split Sentence is not limited to cases sentenced under the HFOA. It is available for any sentence of to imprisonment for 20 years or less.

This sentencing option has gained increased support over the years and is now commonly utilized by trial judges Section 15-8-8, *Code of Alabama* 1975 can be utilized for any offender convicted and sentenced to a period of incarceration of 20 years or less, restricting the actual term of imprisonment as follows:

> Sentence of ***up to 15 years imprisonment - no more than 3 years actual confinement*** (which is not subject to parole or good time deductions), with remainder of the sentence suspended.
>
> Sentence of ***greater than 15 but not more than 20 years imprisonment - not less than three but no more than five years confinement*** (which is not subject to parole or good time deductions), with the remainder of the sentence suspended. (Applicable only for defendants sentenced on or after May 25, 2000, or whose sentence was not final in the trial court on May 25, 2000.)
>
> <u>Suspension of Terms of Imprisonment Authorized</u>
>
> > For Sentences of more than 15 years and not more than 20 years imprisonment, court must order imprisonment of no less than 3 years; however, all or part of this sentence can be suspended. *McCormick v. State*, 2005 WL 3120222 (Ala. 11/23/05)
>
> <u>Mandatory 3-Mile Radius Enhancement Can Be Suspended</u>
>
> In *Soles v. State*, 820So.2d 163 (Ala.Crim.App.2001), the Alabama Supreme Court held that under the Split Sentence Act as amended in 2000 a trial judge can suspend a sentence imposed pursuant to the school/housing enhancements.
>
> > *Example*: Dan Dealing was convicted of the unlawful sale of a controlled substance, a Class B Felony) which is punishable by imprisonment in the

penitentiary for 2-20 years. If the offense occurred within three miles of a school there would be a mandatory five year enhancement and an additional five year enhancement if the sale is also within three miles of a public housing project. The minimum sentence would be 12 years.

Before the *Soles* decision, the 10 years enhancement could not be probated, however, after *Soles*, the court can impose a split sentence, suspending all or a portion of the sentence, including the enhancements.

Retained Jurisdiction

" Regardless of whether the defendant has begun serving the minimum period of confinement ordered under the provisions of subsection (a), the court *shall retain jurisdiction* and throughout that period to suspend that portion of the minimum sentence that remains and place the defendant on probation, notwithstanding any provision of the law to the contrary and the court may revoke or modify any condition of probation or may change the period of probation." § 15-18-8(c)

No Good Time or Parole

"No defendant serving a minimum period of confinement ordered under the provisions of subsection (a) shall be entitled to parole or to deductions from his or her sentence under the Alabama Correctional Incentive Time Act, during the minimum period of confinement so ordered; provided, however, that this subsection shall not be construed to prohibit application of the Alabama Correctional Incentive Time Act to any period of confinement which may be required after the defendant has served such minimum period." § 15-18-8(g)

b. Revoking Probation on Split/Modification

1. Split on a Split - A defendant under a split can be revoked and receive another split, but only if he has not served the maximum 3 years (for a sentence of 15 years or less) or 5 years (for 20 years or less). If he is given another split, the judge can only impose imprisonment for the remainder up to the maximum imprisonment authorized under a split – during which time the defendant will not be eligible for good time or parole. *Phillips v. State*, 2005 WL 628494 (Ala.Crim.App. 3/18/05); *Dixon v. State*, 2005 WL 182827 (Ala.Crim.App. 1/28/05)

2. The trial court retains jurisdiction over a defendant sentenced to a split even after he has served the term of imprisonment [*Dixon v. State*, 2005 WL 182827 (Ala.Crim.App. 1/28/05), overruling *Hollis v. State*, 8845 So.2d 5 (Ala.Crim.App. 2002)], but cannot increase the sentence.

3. A consecutive sentence can be amended to a concurrent sentence, but not vice-versa.

4. Upon revocation of the probation portion of a split the court can
   1). revoke the suspended sentence and the defendant serves the remainder of his sentence term (with credit for time served).
   2). revoke a portion of the suspended sentence and require the defendant to be incarcerated for any time up to the maximum imprisonment for a split (3 or 5 years).

   Where the defendant has been sentence to the maximum term of imprisonment authorized under the split sentence statute, has been released on probation which is subsequently revoked, the judge's only alternative is to revoke the remainder of the sentence that was originally suspended.

5. Time imposed after revocation would entitle defendant to good time (if not otherwise excluded and parole consideration.

c. Boot Camp

Pursuant to § 15-18-8(a)(2), trial courts may commit certain defendants sentenced under the Split Sentence Act to a disciplinary rehabilitation program (Boot Camp) under the operation of the Department of Corrections, after consultation with the Commissioner. Participation in this program is only for a certain time period (not less than 90 nor more than 180 days) and is governed by departmental rules and regulations.

5.. Community Corrections and Punishment Act
Title 15, Chapter 18, Article 9, *Code of Alabama 1975*

Notwithstanding any law to the contrary, judges are authorized to sentence eligible offenders to appropriate community-based punishment programs either in conjunction with a split sentence, as an alternative to prison, or as a condition of probation. In sentencing offenders to any community-based alternative program, the court is authorized to set the duration of the sentence for the offense committed "to any period of time up to the maximum sentence within the appropriate range for the particular offense." § 15-18-175(d), *Code of Alabama 1975.*

The Community Punishment and Corrections Act of 1991, *as amended by Act 2003-353, effective 7/20/03,* (Sections 15-18 170 through 15-18-185, *Code of Alabama* 1975), provides for community-based punishment alternatives such as day reporting, home detention, electronic monitoring, half-way houses, restitution programs, community service, education and intervention programs and inpatient and out-patient substance abuse treatment programs.
See VII. Alternative Sentencing, p. 38

III. PROCEDURES RELATING TO SENTENCING – ALABAMA CRIMINAL RULES

Presentence Investigation (PSI) Report – Felonies

A written report of a presentence investigation may be required in any case in which the court has discretion over the penalty to be imposed or authority to suspend execution of the sentence. For felony offenses, a presentence report is required upon written motion made by either party or on motion of the court. When required, the defendant is not to be sentenced until the presentence investigation (PSI) report has been presented to and considered by the court.

Prior to the sentencing hearing copies of the must be furnished to the court, the district attorney, the defense attorney or, when not represented by counsel, the defendant. *Rule 26.3, Alabama Rules of Criminal Procedure.*

PSI Reports are not public records. *Rule 26.5(c) Alabama Rules of Criminal Procedure*

Rule 26.2 directs that the judgment of guilt and the pronouncement of the sentence should be entered at the same time. Pre-sentence reports are available for the trial courts as follows:

1. All Offenses. The court may require a pre-sentence report in all cases in which it has either discretion over the penalty to be imposed or authority to suspend execution of the sentence.

2. Felony Offenses. On motion of the court or written motion of either party, the court shall require a written report of a pre-sentence investigation of a defendant convicted of a felony, and such defendant shall not be sentenced or otherwise disposed of before such report has been presented to and considered by the Court.

Contents

This Rule provides that the pre-sentence report may include the following information. A statement of:

1. the offense and the circumstances surrounding it;
2. the defendant's prior criminal and juvenile record, if any;
3. the defendant's educational background;
4. the defendant's employment background, financial condition, and military record, if any;
5. the defendant's social history, including family relationships, marital status, interests, and activities, residence history, and religious affiliations;
6. the defendant's medical and psychological history, if available; and
7. Victim Impact Statements; and
8. Any other information required by the court.

It has been recommended that the report be accompanied by a copy of the defendant's and co-defendant's confession or other pretrial statement. In the case of sexual offenses, the pre-sentence report includes the victims' statements.

Pronouncement of Judgment and Sentence

To sentence a defendant means to pronounce the penalty imposed upon the offender after a judgment of guilty. Rule 26.2 of the Alabama Rules of Criminal Procedure directs that the judgment of guilt and the pronouncement of sentence should be entered at the same time.

Although the 26.2 A.R.Cr.P expresses a preference for judgment of guilt and sentence be pronounced at the same time, interpreting its predecessor temporary procedural rule, the Court of Criminal Appeals held that simultaneous in-court pronouncement of judgment and sentence are not required. *Edwards v. State*, 505 So.2d 1297 (Ala.Crim.App. 1987).

Judgment must be announced in open court and must reflect the plea, verdict, findings, if any, and the adjudication. Before sentence is imposed, the defendant must be given an opportunity to make a statement in his or her own behalf. The right to **allocution** applies regardless of the gravity of the sentence imposed. Davis v. State, 747 So.2d 921 (Ala.Crim.App. 1999). In addition, the court must explain **pre-trial credit**, i.e., state that the defendant will be allowed credit on his or her sentence for any time he has been incarcerated on the present charge, explain the **terms of the sentence**, and notify defendant of his/her **right to appeal.**

Minute Entries: The clerk is required to keep a case action summary sheet in each case, noting the proceedings and actions, along with their dates. The case action summary is considered the official minutes of the case and certified copies are admissible to prove prior convictions.
Rule 26.9 *Alabama Rules of Criminal Procedure.*

SENTENCING ORDERS:

Since judges are not allowed to respond to criticism of sentencing decisions, one of the most effective ways to inform victims and the public of the reasons for your decision is through a written sentencing order. A well reasoned, and well written sentencing order in a high profile or controversial case can be an effective tool for reducing criticism of your sentencing decision.

Sentence Hearing
For felony offenses, the court must conduct a sentence hearing and pronounce sentence. The only instances in which a hearing may be avoided are (1) when the court has no discretion as to the penalty to be imposed and no power to suspend execution of the sentence or (2) when a hearing is waived by the parties with the consent of the court.

***When Held*:** After determination of guilt or continued by the court to a later date. If a PSI is required, the sentence hearing cannot be held until copies have been made available or furnished to the court and parties.

Evidence: Can be presented by defendant and State on any issue the court deems probative on the issue of sentence, i.e., nature and circumstances of offense; defendant's character, background, mental and physical condition, or history; financial gain to the defendant; loss suffered by the victim(s), or any aggravating or mitigating factor. The court determines the probative value of evidence and admissibility, Rules of Evidence do not govern.

BOP: Disputed facts are determined by "preponderance of evidence" standard.

HFO: If a hearing is necessary to establish prior convictions, the State is required to give reasonable notice to defendant and assumes the burden of proof to show prior convictions. In determining disputed facts, "beyond a reasonable doubt" standard of proof applies. Convictions from other jurisdiction can be used for enhancement if they would have been a felony under Alabama law on or after Jan. 1, 1980. Federal crimes are considered a felony conviction if punishable by imprisonment in excess of one year under federal law, even if not punishable under Alabama law.

Rule 26.6 Alabama Rules of Criminal Procedure.

IV. Crime Victim Assessment and Restitution

Victim Restitution

In any case in which a defendant is convicted of criminal activity resulting in pecuniary damages or loss to a victim, the court is required to conduct a restitution hearing and order the defendant to "make restitution or otherwise compensate such victim for any pecuniary damages." Section 15-18-67, *Code of Alabama* 1975. In determining the manner, method or amount of restitution to be ordered, the court is encouraged to take into consideration:

(1) The financial resources of the defendant and the victim and the burden that the manner or method of restitution will impose upon the victim or the defendant;

(2) The ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(3) The anticipated rehabilitative effect on the defendant regarding the manner of restitution or the method of payment;

(4) Any burden or hardship upon the victim as a direct or indirect result of the defendant's criminal acts;

(5) The mental, physical and financial well being of the victim. Section 15-18-68, *Code of Alabama* 1975

Mandatory Crime Victim Compensation Assessment

Pursuant to Section 15-23-17, *Code of Alabama* 1975, a victim compensation fee in the amount of not less than $50 and no more than $10,000 shall be assessed against any person convicted or pleading guilty to a felony and "[i]n imposing this penalty, the court shall consider factors such as the severity of the crime, the prior criminal record, and the ability of the defendant to pay, as well as the economic impact of the victim compensation assessment on the dependents of the defendant." Section 15-23-17(b), *Code of Alabama* 1975.

V. Recent Developments

A. Kirby Motions – HFOA Amendments

Alabama's Habitual Felony Offender Act was amended, effective May 25, 2000, to provide that a person convicted of a Class A felony after three prior felony convictions, none of which were a Class A felony, could be sentenced to life *or life without* parole and to expand the sentencing options for a defendant with three prior felony convictions who is subsequently convicted of a Class B felony to include an imprisonment term of not less than 20 years or life imprisonment (prior law provided only for life imprisonment). This amendment was only to be applied prospectively. The following year the statute was further amended by Act 2001-977 to provide for the retroactive application of such sentences (life) by the sentencing judge or presiding judge upon the evaluation of non-violent offenders for early parole performed by the Department of Correction and approved by the Board of Paroles.

By Executive Order #62, the Governor ordered the Department of Corrections (DOC) to establish a procedure for the evaluation of non-violent offenders and submit its proposal on June 1, 2002, to the Attorney General and the Sentencing Commission for their recommendations and comments. Based on this Executive Order, implementation of Act 2001- 977 would be considered for approval by the Governor after the Sentencing Commission and Attorney General reviewed the proposal prepared by DOC and provided their input.

The Department of Corrections submitted a proposed procedure to the Sentencing Commission on June 1, 2002, which was immediately mailed to the members of the Sentencing Commission and Advisory Council and placed on the agenda for the next meeting, held June 28, 2002. Because the proposed procedure failed to include a definition of a "violent offender" or "violent offense," Commission members requested that Chairman Judge Colquitt write Dr. Haley and request clarification on this matter as well as other issues. Commissioner Haley responded to Judge Colquitt's letter requesting that Judge Colquitt and members of the Sentencing Commission meet with representatives of the District Attorneys, VOCAL, and Department of Corrections to discuss DOC's proposed procedure. A meeting was held on Monday, August 19, 2002, but Commissioner Haley was unable to attend due to health reasons. We were unable to resolve the legal and procedural problems associated with Act 2001-977 or the implementation procedure proposed by the Department of Corrections.

When the Sentencing Commission met on August 23, 2002, the proposed procedure was again on the agenda; however, because there were still concerns that had not been addressed by DOC regarding the proposed evaluation procedure, *no vote was taken on the definition that was submitted by the Department of Corrections*. The primary issues that the members of the Sentencing Commission indicated still need to be addressed in the proposed procedure for evaluation and implementation are: 1) the omission of the Board of

Pardons and Paroles from the evaluation process; 2) the authority of the trial courts and the role they are to play in this "early parole" process; 3) the effect of the preclusion grounds, statute of limitations and other provisions governing Rule 32 petitions; and 4) whether adequate input has been obtained from victims, victim advocates and prosecutors in developing the proposed procedure.

After an extended discussion regarding the problems associated with implementing Act 2001-977, by unanimous vote of the members present, the Sentencing Commission recommended that these questions were ones that should be presented to the courts for clarification, perhaps in an action brought by the Attorney General's Office, Board of Pardon and Paroles, and/or Department of Corrections. In making this suggestion, it was noted that the key issues that needed to be addressed were the constitutionality of Act 2001-977 and the jurisdiction of the trial court under Act's provisions.

Although the Department of Corrections and the Sentencing Commission attempted to interpret the amendments to the Habitual Felony Offender Act and develop a workable procedure for implementation of Act 2001-977, it was felt that until there was a judicial interpretation of the Act's provisions and a definitive determination on the role and authority granted to the trial courts and the Board of Pardons and Paroles, any recommendation for implementation would be premature.

By letter dated August 26, 2002, the Sentencing Commission, through its Chairman, notified Commissioner Haley of its recommendation for judicial interpretation. To my knowledge there was no further action by the Department of Corrections on developing an implementation procedure. The Sentencing Commission complied with the Governor's Executive Order, commenting on the proposed procedure.

In an attempt to resolve the impasse and clarify the procedures that should be followed for retroactive implementation, during the 2003 Legislative Session Representative Demetrius Newton introduced HB 523 on 4/8/03 and Representative Brewbaker, along with D. Newton introduced HB 744 on 5/15/03. Neither of these bills passed. During the 2004 Regular Session Demetrius Newton introduced HB 365 and Representative Brewbaker introduced HB 61, neither of which passed.

March 7, 2003, in the case of State of Alabama v. Junior Mack Kirby, CC-1989-252, the Circuit Court of Jackson County held Act 2001-977 unconstitutional on the grounds it constitutes an unlawful delegation of legislative power in violation of the separation of powers doctrine. In issuing its ruling, the Court invited the Legislature to revisit this issue utilizing the work done by DOC and the Sentencing Commission on who should be considered violent and nonviolent. The Supreme Court granted Cert in this case and in an opinion issued August 27, 2004, reversing the Court of Criminal Appeals' order dismissing the appeal, held

that there should be no further delay of the retroactive application of the 2000 amendment to § 13A-5-9 to allow trial courts to modify the sentences of those eligible inmates formerly sentenced under the HFOA. The Attorney General filed a request for rehearing in this case before the Supreme Court.

Staff of the Administrative Office of Courts, Department of Corrections, Pardons and Paroles met on Friday, September 24, 2004 and discussed possible procedures and a form petition for submission to the Supreme Court's Standing Committee on the Rules of Criminal Procedure.

The Criminal Rules Committee (Chaired by former Presiding Judge of the Court of Criminal Appeals, Bill Bowen), had originally scheduled a meeting for September 29, 2004 to consider the Kirby Opinion and proposed procedures for implementation; however, this meeting was cancelled and was rescheduled for Tuesday November 23, 2004, following issuance of the Certificate of Judgment by the Supreme Court on October 22, 2004. When the Rules Committee met on November 23, 2004, the majority of the members voted not to recommend a rule of procedure to govern motions or petitions to modify sentences pursuant to Act 2001-977 and the Kirby Opinion.

HABITUAL FELONY OFFENDER ACT - § 13A-5-9 (as amended)

Prior Felonies ɜ **This Offense □**	**NO Prior Felonies**	**One Prior Felony**	**Two Prior Felonies**	**Three Prior Felonies**
Class A Felony (No prior conviction for a Class A Felony)	10-99 Years or Life In State Penitentiary Fine up to $20,000	15-99 Years or Life In State Penitentiary (Fine up to $20,000)	Life Imprisonment or Any Term of Years Not Less than 99 years (Fine up to $20,000)	Mandatory Imprisonment for Life or Life Imprisonment Without Possibility of Parole (Fine up to $20,000)
Class A Felony (One or more prior convictions for any Class A Felony)	10-99 Years or Life in State Penitentiary Fine up to $20,000	15-99 Years or Life in State Penitentiary (Fine up to $20,000)	Life Imprisonment or Any Term of Years Not Less than 99 Years (Fine up to $20,000)	Mandatory Imprisonment For Life Without Possibility of Parole (Fine Up to $20,000)
Class B Felony	2-20 Years In State Penitentiary Fine up to $10,000	10-99 Years or Life In State Penitentiary Fine up to $20,000	15-99 Years or Life In State Penitentiary (Fine up to $20,000)	Minimum of not less than 20 years or Life Imprisonment (Fine up to $20,000)
Class C Felony	1 Year & 1 day - 10 Years In State Penitentiary Fine Up to $5,000	2-20 Years In State Penitentiary Fine up to $10,000	10-99 Years or Life In State Penitentiary Fine up to $20,000	15-99 Years or Life In State Penitentiary (Fine up to $20,000)

As amended by Act 2000-759 and Act 2001-977
Underlining represents amended language.

§ 13A-5-9. Habitual felony offenders -- Additional penalties.

(a) In all cases when it is shown that a criminal defendant has been previously convicted of a felony and after the conviction has committed another felony, he or she must be punished as follows:
(1) On conviction of a Class C felony, he or she must be punished for a Class B felony.
(2) On conviction of a Class B felony, he or she must be punished for a Class A felony.
(3) On conviction of a Class A felony, he or she must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.

(b) In all cases when it is shown that a criminal defendant has been previously convicted of any two felonies and after such convictions has committed another felony, he or she must be punished as follows:
(1) On conviction of a Class C felony, he or she must be punished for a Class A felony.
(2) On conviction of a Class B felony, he or she must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.
(3) On conviction of a Class A felony, he or she must be punished by imprisonment for life or for any term of not less than 99 years.

(c) In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony, he or she must be punished as follows:
(1) On conviction of a Class C felony, he or she must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.
(2) On conviction of a Class B felony, he or she must be punished by imprisonment for life or any term of not less than 20 years.
(3) On conviction of a Class A felony, where the defendant has no prior convictions for any Class A felony, he or she must be punished by imprisonment for life or life without the possibility of parole, in the discretion of the trial court.
(4) On conviction of a Class A felony, where the defendant has one or more prior convictions for any Class A felony, he or she must be punished by imprisonment for life without the possibility of parole.
(Acts 1977, No. 607, p. 812, § 1235; Acts 1979, No. 79-664, p. 1163, § 1; Act 2000-759.

§ 13A-5-9.1. Retroactive application of Section 13A-5-9.

The provisions of Section 13A-5-9 shall be applied retroactively by the sentencing judge or presiding judge for consideration of early parole of each nonviolent convicted offender based on evaluations performed by the Department of Corrections and approved by the Board of Pardons and Paroles and submitted to the court.
(Act 2001-977, 3rd Sp. Sess., p. 941, § 1.)

Motion For Sentence Modification
Pursuant to Act 2001-977

(please print)

Defendant _____ **Case No.** _____

Inmate AIS#_____ **Sentence** _____

County of Conviction _____ **Sentencing Judge**_____

Date of Sentence _____ **Date of Admission** _____

Comes now the defendant in the above styled case and petitions the court to reconsider the sentence previously imposed under Alabama's habitual felony offender statute, as amended by Act 2000-759, Act 2001-977, and pursuant to the Alabama Supreme Court's holding in Ex parte Kirby, 2004 WL1909345 (Ala. 8/27/04). ***I swear and affirm that the following facts are true and correct.***

Last (Current) Conviction Offense

_____

Most Serious Conviction Offense_____

Date Sentenced Under the Habitual Felony Offender Statute _____

(Must be prior to 5/26/2000)

I swear and affirm that:

☐ **I am currently serving a prison sentence of "*Life without the possibility of parole*," having been convicted of Class A Felony and sentenced under the Habitual Felony Offender Act, prior to its amendment by Act 2000-759(effective 5/25/2000), and that none of my prior convictions were for a Class A felony.** ***OR***

☐ **I am currently serving a prison sentence of "Life imprisonment," having been convicted of a Class B Felony and sentenced under the Habitual Felony Offender Act, prior to its amendment by Act 2000-759 (effective 5/25/2000).**

List all prior adult felony convictions, including out-of-state convictions (must be three or more)

1. Crime_____**Date**_____ **Place of Conviction**_____

2. _____ _____ _____

3. _____ _____ _____

4._____

5. _____ _____ _____

Sworn to and subscribed before me,

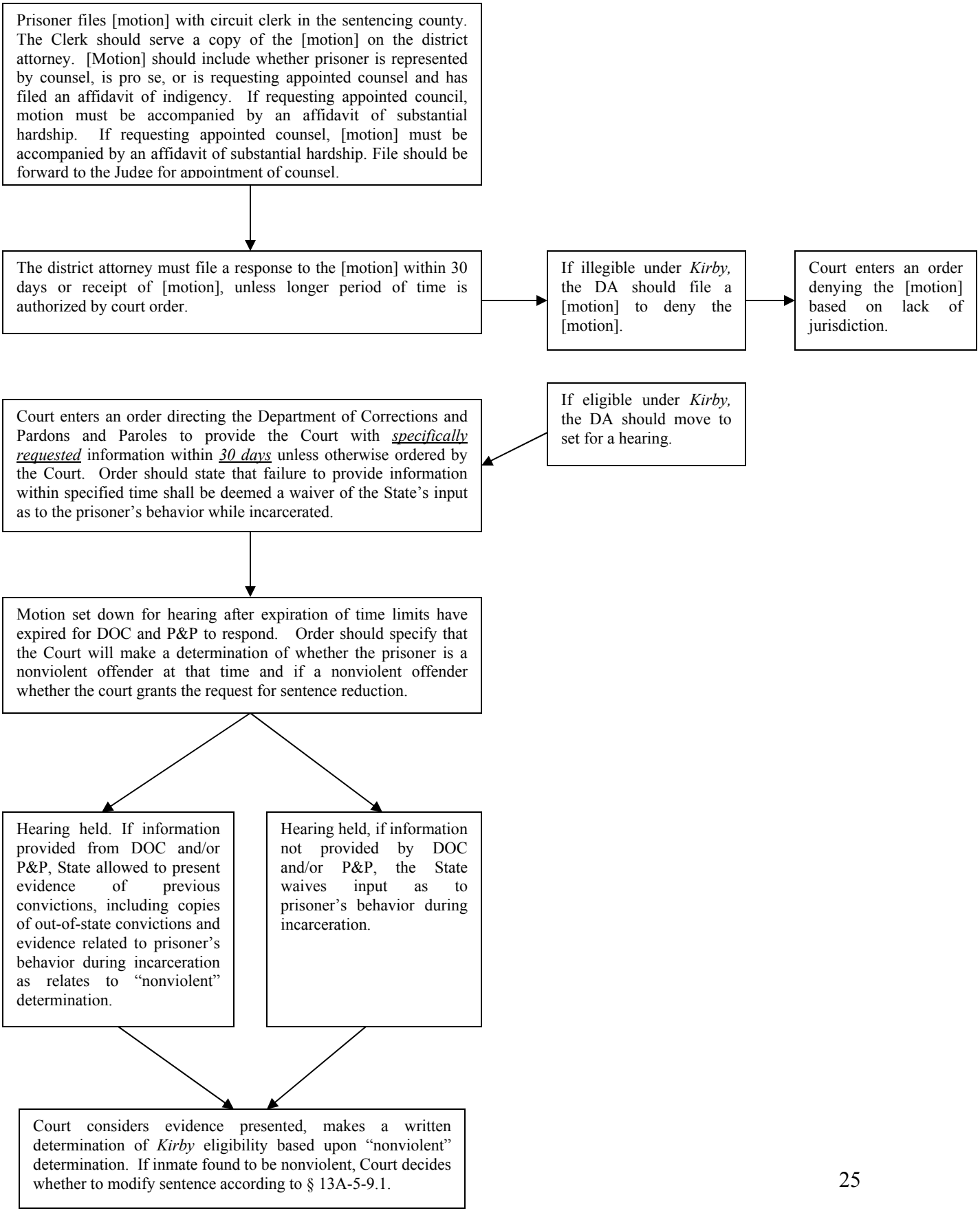
_____ _____

Notary Public **Signature of Defendant**

_____

Date

Proposed Procedures Chart



Sample Kirby P&P Production Order

IN THE CIRCUIT COURT OF *******COUNTY, ALABAMA

Paul Prisoner, AIS # 234789	**)**	
	)	
	)	
v.	**)**	**CC-2001-0756-X**
	)	
	)	
	)	
State of Alabama	**)**	

ORDER

This cause being before this Court upon [motion] of Paul Prisoner seeking resentencing pursuant to *Ex parte Kirby*, 2004 WL 1909345 and Ala. Code §§ 13A-5-9 and 9.1 which allows certain convicted offenders to be resentenced retroactively. The Alabama Supreme Court vested in the sentencing court the authority to make the determination of whether an inmate is eligible for consideration for resentencing. The Court specifically referred to the inmate's conduct while incarcerated and that such knowledge was within the purview of the Department of Corrections. Further, the Court included information submitted (to the trial court) by the Parole Board as among the factors to be considered.

THEREFORE, the Board of Pardons and Paroles is hereby ordered to submit to this Court a Pre-sentence investigation report within <u>30</u> days of the date of this order. The Department of Corrections shall submit to this Court the following information relating Paul Prisoner: (1)current offense and sentence, (2) admission date to DOC, (3) time served, (4) next parole review date, (5) maximum release date,

(6) all prior convictions including offense, date and sentence received, (7) number, if any of probation or parole revocations, (8) number, if any of escapes or attempted escapes, (9) all disciplinaries and the specific rule violations which resulted in such disciplinaries and a factual accounting of each violation, (10) any new offenses committed while in DOC custody, (11) a copy of any evaluation of the inmate's conduct conducted by the Department of Corrections pursuant to Ala. Code §13A-5-9.1.

In accordance with *Ex parte Kirby*, supra, the failure of either the Department of Corrections or the Board of Pardons and Paroles to provide such requested information to this Court shall be deemed as a waiver to any input as to the inmate's conduct while incarcerated.

The Clerk shall serve a copy of this order upon Paul Prisoner, the Department of Corrections, the Board of Pardons and Paroles, and the District Attorney of the 00th Circuit.

DONE AND ORDERED THIS _____ day of _____, 2004 at Anytown, Any County, Alabama.

_____
Circuit Judge

Sample Kirby DOC Production Order

IN THE CIRCUIT COURT OF SOME COUNTY, ALABAMA

STATE OF ALABAMA,	**)**	
	)	
Plaintiff	**)**	
v.	**)**	
John Doe ,	**)**	**CASE NO: CC 94-1161**
Defendant.		

ORDER

The Defendant has filed a Motion entitled "Motion for Reconsideration of Sentence" dated October 13, 2004. In support of said Motion the Defendant cites Section 13A-5-9.1 and the case of Ex *Parte State of Alabama* (*In Re. Junior Mack Kirby v. State of Alabama*) 2004 West Law 190934. The *Kirby* decision allows the retroactive application Section 13A-5-9 and the Legislature vested jurisdiction in the sentencing judge or presiding judge to reopen a case more than thirty (30) days after sentencing. However, the Court's decision is only applicable to a narrow defined group of inmates. The inmates that fit into the criteria are as follows:

1. Those who were sentenced under the Habitual Offender Act;
2. Sentencing prior to May 26, 2000;
3. Who were currently serving either a sentence of Life without the possibility of Parole and none of the prior convictions used for enhancement purposes were Class A felonies ...
4. Who were determined, by the sentencing or presiding Judge to be a non-violent offender.

According to *Kirby,* the first three elements would apply to Doe. Furthermore, according to *Kirby* to help aid in determining if the Defendant is a non-violent offender, "the Court should consider the inmate's conduct while incarcerated." Defendant Doe fits the first three items of the criteria. Therefore, the Department of Corrections is ordered to provide to this Court information that would aid this Court in determining whether or not the Defendant is a non-violent offender.'

Specifically, the Department of Corrections is to provide to the Court any disciplinary sanctions received by the Defendant while incarcerated and any reports regarding those underlying citations. The Department of Corrections is to provide this information to the Court within forty-five (45) days from the date of this Order. The Court reserves ruling on the other Motions filed by the Defendant until after the Court has received the information from the Department of Corrections.

The Clerk of the Court is ordered to mail by ordinary mail or deliver a copy of this Order as follows:

Mr. John Doe #148206
W. E. Donaldson Facility
100 Warrior Lane Bessemer, AL 35023

Hon. Sam Smith
District Attorney
Post Office Box 78

Montgomery, AL 35101-0078

Hon. Charles Crook
Department of Corrections
101 South Union Street
Montgomery, AL 3610

DONE this the 5th day of November, 2005.

Circuit Judge

From reading Kirby, the Defendant's prison record is not the only factor in determining whether or not the Defendant is non-violent. The Court is also, according to Kirby to look to the nature of the Defendant's underlying conviction, other factors brought before the *Judge* in the record of the case, and information submitted to the Judge by the Department of Corrections and Parole Board concerning the inmate's behavior while incarcerated

Sample Kirby Denial Order

IN THE CIRCUIT COURT OF ANY COUNTY, ALABAMA

STATE OF ALABAMA **CC-**
v.
_____ JOHN DOE

The Defendant has filed a Petition seeking to modify his sentence previously imposed under the Habitual Offender law in Case No. CC-93-__ and enhanced or added to by the revocation proceeding in Case No. CC-89-.__ Case No. CC-93-__was a conviction of Resisting Arrest where the judge imposed a 30 day sentence to run concurrent with the sentence in CC-93-__ and presumably that sentence is disposed for all practical purposes. The Defendant was originally convicted in CC-89-__ and in 1990 sentenced to a split sentence of 15 years with a confinement term of 2 years as a first condition of probation. After he committed the 1993 offense the Defendant's probation was revoked in CC-89-__ and he was directed to serve the balance of the 15 year sentence. The Defendant in CC-93___ was sentenced to 10 years in the penitentiary, consecutive to the sentence in CC-89-._. All of this resulted in the Defendant facing a 25 year penitentiary sentence on these two cases, less the time served on the earlier split sentence and any pre-revocation or new pretrial confinement. The modification sought by the Defendant appears to be on the basis of the change to the Habitual Offender Act brought on by the Amendments to Section 13A-5-9 Code of Alabama 1975, as made retroactive by Section 13A-5-9.1, The changes to the Habitual Offender Act only effect an opportunity to those inmates or Defendants who were originally sentenced to a Class B felony as a Habitual Offender with three prior felony convictions to "life" in the penitentiary, and to those inmates or Defendants who were originally sentenced to a Class A felony as a Habitual Offender with three prior felony convictions to "life without possibility of parole." These two classes of inmates, if they are determined to be non-violent inmates, could have their sentences reduced from "life" to "not less than 20 years," or from "life without possibility of parole" to **"life." The Defendant does not fit** in either of **those categories and hence his Petition is without merit. Based on the *foregoing,*** it is

ORDERED, ADJUDGED and DECREED that the Defendant's Petition for Relief from Conviction or Sentence be and the same is hereby denied.
DONE this the__day of _____,2004 At Some town, Alabama..

_____
Circuit Judge

B. Child Sex Offender Act

New Offenses- More Severe Penalties

(1) § 13A-5-2(d)

Prohibits persons convicted of child sex offenses as defined by Act (victims under 12) and child pornography offenses (children under 17) from receiving probation. Includes Class A, B and C felonies, as well as misdemeanors i.e., sexual abuse 2nd, any crime involving lewd and lascivious conduct. Appears to conflict with amendments to the split sentencing statute which only prohibits defendants charged with Class A and B felony child sex offenses from being sentenced under the split sentencing statute, which requires that a portion of the sentence be served on probation.

(2) Mandatory Minimum – Class A child sex offenders § 13A-5-6

Class A - Not less than 20 years incarceration (additional 10 years)
Class B - Not less than 10 years incarceration (additional 8 years)

(3) 10 years post-release supervision must be imposed as an additional penalty on any defendant convicted of a Class A felony criminal sex offense involving a child (including pornography offenses) and any offender designated as a sexually violent predator. (§ 13A-5-6 (c)

(4) Enticing Child into vehicle, etc. § 13A-6-69

Punishment for first offense increased from maximum of 5 years to 10 years. Provision for enhanced penalty was eliminated; under prior statute second conviction was punishable by imprisonment for not less than 2 nor more than 10 years and the person was not eligible for probation. As amended, a violation of this section is punishable as a Class C felony (1 year and a day up to 10 years).

(5) Failure/Refusal to Register § 13A-11-200

- Decreases time in which a sexual offender (not juvenile delinquents) must register his residence following release from custody or upon moving from 30 to 7 days.
- Adds pleas of nolo contendere as convictions, even where adjudication withheld
- Makes it a Class C felony to fail or refuse to register residence. Previously punishable by imprisonment not less than one year nor more than five years. Increased authorized penalty by five years imprisonment.

(6) No good time for any child sex offenders § 14-9-41.

Includes all degrees and pornography offenses.
Was withheld for Class A felons, defendants sentenced to life or death or those receiving a sentence of more than 15 years and splits during minimum confinement period.

(7) Split Sentence/Probation Prohibited § 15-18-8

Amends split sentencing statute to prohibit defendants convicted of a Class A or B felony child sex offense from receiving a split sentence. Class C felony child sex offenders may receive a split sentence.

Prohibits Class A or B child sex offenders from receiving probation. Although other provisions of the Act amending the Criminal Code may appear to prohibit probation for all sex offenders, this statute excludes only A and B child sex offenders and provides, "Otherwise, probation may be granted whether the offense is punishable by fine or imprisonment or both."

(8) § 15-20-21 Defines "Adult Criminal Sex offender" to include a person who has pleaded **nolo contendere** to a criminal sex offense, regardless of whether adjudication was withheld.

(9) Community Notification Act § 15-20-21
Amends this section to include a catchall provision for other crimes – "Any crime committed in any jurisdiction which, irrespective of the specific description or statutory elements thereof, is in any way characterized or known as rape, sodomy, sexual assault, sexual battery, sexual abuse, sexual torture, solicitation of a child, enticing or luring a child, child pornography, lewd and lascivious conduct, taking indecent liberties with a child, or molestation of a child**."**

Adds term "Criminal Sex Offense Involving a Child," defined as "a conviction for any criminal sex offense in which the victim was a child under the age of 12 and any offense involving child pornography (which apply to children under 17)."

Amends definition to employment to "include any full-time or part-time employment for any period, whether financially compensated, volunteered, or for purposes of government or educational benefit." Prior statute had exception for short periods of part-time employment.

(10) § 15-20-22 Requirements Prior to Release
Increases time prior to release from 30 to 45 days for responsible agency to notify Public Safety of the inmates address upon release. Added requirement for name and physical address of employer.

More Severe Punishment for Untimely/Inaccurate Declarations
Failure to provide timely and accurate declarations increased from a Class A misdemeanor to a Class C felony.

> **Notification Violations**
> Adult criminal sex offenders in violation are not eligible for probation or parole and those who are due to EOS can only be released on bond and as a condition comply with notification provisions.
>
> Adds notification for offender intending to "be employed outside of the state" and requires notification by responsible agency to DPS, AG, CJIC and law enforcement of other state within 5 business days of declarations. Also provides for notification for sex offenders intending to "reside, live, or be employed within this state." Prior to changes pursuant to Act 2005-301, the notification requirements only referred to *residing* outside or within the state.

New Offense – Failure To Advise of Employment - Class C Felony
Adds a provision for offenders that do not have employment upon release – Upon obtaining employment requires declaration to Sheriff and Police Chief where employed by the end of the next business day after obtaining employment. Establishes new offense – Class C felony, for failure to timely advise of employment.

(11) § 15-20-23 Notification – Change of Residence – More Severe Penalty
Omits reference to "legal" residence, omits reference to "intentional" failure to notify, and increases penalty for failing to provide a timely and accurate written declaration from a Class A misdemeanor to a Class C felony.

§ 15-20.23.1 Failure to submit notice of intent of change of employment – Class C felony

Provides that offender will be deemed to establish a new residence in any of the following situations: 1) when he is domiciled for 3 or more consecutive days (was 5 days); 2) whenever he is domiciled following his release or NEW PROVISION; 3) whenever he spends 10 or more aggregate days at a location during a calendar month.

(12) Periodic Verification of Residence § 15-20-24
Amends this statute to require any adult criminal sex offender to report in person to the sheriff or chief of police within 60 days of his or her most recent release, thereafter each year within 30 days of the offender's birthday and every 6 months following his birthday.
(Check reference on page 31, line 12 regarding reference to "within 90 days of his or her most recent release.")

New Offense – False Statements
Provides that any adult criminal sex offender who fails to comply with verification process or provides a false statement to law enforcement in the verification process, or knowingly fails to permit law enforcement personnel to obtain fingerprints or photograph is guilty of a Class C felony. The provision regarding false statements creates new offense.

(13) Registration by Non-Resident Workers and Students § 15-20-25.1
Increases penalty for intentional failure to provide timely and accurate written declaration from a Class A misdemeanor to a Class C felony.

(14) Notice of Employment, Enrollment at institution of higher education § 15-20-25.2
References to "school" omitted, now refers to "institution of higher education".
Increases penalty for intentional failure to provide timely and accurate written declaration from a Class A misdemeanor to a Class C felony.

(15) Sexually Violent Predator § 15-20-25.3
Provides that a sexually violent predatory must undergo electronic monitory for no less than 10 years after his release from incarceration. This requirement shall be a part of the predator's sentence.

(16) Prohibited Residence Locations § 15-20-26
Prohibits adult criminal sex offenders who are parents, grandparents or stepparents of the minor from residing with a minor if: 1) parental rights have been or are being terminated; 2) offender has been convicted of any criminal sex offense involving his children, grandchildren or stepchildren; 3) the offender has been convicted of a sex offense in which a minor was the victim and the minor resided or lived with the offender at the time of the offense; and 4) NEW the adult sex offender has ever been convicted of any sex offense involving a child, regardless of whether he was related to or shared a residence with the child victim.

New offense of loitering within 500 feet provided - Class C felony

New offense of carrying on employment or vocation within 500 feet of school, child care facility, playground, park, athletic field or facility or any other business or facility having a principal purpose of caring for, educating, or entertaining minors. Class C felony.

Juvenile Sex Offenders – Requirements prior to Release § 15-20-29
The only substantive change is in subsection (c) relating to community notification. It was amended to provide "community notification, however, shall <u>not</u> be allowed, unless so ordered by the sentencing court." It appears that this was a correction in the existing law.

(17) § 15-20-31 Requires the sentencing court to order sex offending youths that are treated as a juvenile criminal sex offenders under the Act to undergo sex offender treatment and a risk assessment prior to release. Note problems mentioned earlier with finding approved treatment providers.

(18) CJIC Electronic Monitoring § 15-20-26.1
Specifically provides that electronic monitoring may be a condition of parole, probation, community corrections, CRO supervision, pretrial release, or any other community based punishment option for any criminal sex offender.

Subsection (d) requires Class A felony child sex offenders to undergo no less than 10 years of electronic monitoring upon release, as a part of their sentence (includes Class A pornography offenses).

Driver's License- § 15-20.26.2 Failure to have valid driver's license or Public Safety ID. Class C Felony.

(19) Abolition of Parole § 15-22-27.3
Prohibits parole of any person convicted of a Class A or B felony sex offense involving a child**.**

(20) Bid Law
Requires that procurement of product or services for compliance with the Act, specifically electronic monitoring, equipment, etc. to comply with the competitive bid process.

VI. Good Time and Parole

Alabama's Good Time Laws and Discretionary Parole Practices Produce Uncertainty In Sentencing

In Alabama, the release date for most inmates is determined not by the judge, but rather, based on the amount of "good time" awarded and the release decisions left to the discretion of a 3-member parole board. "Good time" credits, like parole, directly affect the length of time a prisoner spends behind bars, altering the sentence handed down by the trial judge. Alabama has the distinction of having one of the most generous good time laws, with prisoners receiving two and one-half days for every day served.

In practice, good time credits are not "earned." The grant of credits does not depend on an inmate's participation in prison programs, work time or outstanding service, but rather, are automatically calculated upon entry into the prison system and are only denied or forfeited for bad conduct or rule violations. These credits are considered to be an entitlement and any forfeiture or denial, punishment. The average inmate serving a sentence of 15 years or less is given 243 days credit for every 365 days served (a total of 608 days per year).

The current system is a complicated four-level structure that takes into account various factors such as: the applicable earning class, disciplinary infractions, type of sentence, the crime of conviction, and whether multiple terms are being served concurrently or consecutively. The system then uses these factors to calculate sentence good time deductions.

Although the Correctional Incentive Time laws (CIT), §§ 14-9-40, et seq., applies to most inmates (those committing crimes on or after May 19, 1980), statutory good time and incentive good time statutes are still applicable to prisoners incarcerated for crimes committed prior to May 19, 1980. Incentive Good Time (IGT) is an additional one-for-one (maximum by statute is 2 days for each day served) reduction in sentence authorized for *inmates serving SGT* who exhibit exceptional behavior and are approved by the proper authorities.

> Trial judges should avoid trying to explain good time to a defendant, but should have the defendant acknowledge on the record that his guilty plea is offered without consideration or when or whether he would be entitled to early release.

A. Good Conduct Credit – Correctional Incentive Time

1. Offenders Not Entitled To Good Time Credit

- **Inmates sentenced to life imprisonment or death and inmates convicted of a Class A felony.**

- **Inmates receiving a sentence of more than 15 years in the state penitentiary or in the county jail at hard labor.**

- **Inmates serving a split sentence, during the minimum term of imprisonment.**

- **Defendants sentenced under mandatory enhancement statutes serving sentences not subject to early release provisions. § 14-9-41, *Code of Alabama* 1975.**

- **Defendants on probation.**

- **Inmates convicted of a criminal sex offense involving a child as defined in § 15-20-21(5) (including child pornography applicable to children under 17 years of age.**

2. Offenders Serving Hard Labor for County or Municipal Jail

a. Section 14-9-41(a) provides that good time is available

" Each prisoner who shall hereafter be convicted of any offense against the laws of the State of Alabama and is confined, in execution of the judgment or sentence upon any conviction, in the penitentiary or at *hard labor for the county or in any municipal jail* for a definite or indeterminate term, other than for life, whose record of conduct shows that he has faithfully observed the rules for a period of time to be specified by this article may be entitled to earn a deduction from the term of his sentence as follows:…"

b. Section 14-9-41(e) Adds Confusion

"Provided, however, no person may receive the benefits of correctional incentive time if he or she has been convicted of a Class A felony or has been sentenced to life, or death, *or who has received a sentence for more than 15 years in the state penitentiary or in the county jail at hard labor or in any municipal court.* No person may receive the benefits of correctional incentive time if he or she has been convicted of a criminal sex offense involving a child as defined in Section 15-20-21(5)…."

3. Minimum Time in Each Class

Class IV- No Credit	30 days
Class III- 20 days for every 30 served	90 days
Class II- 40 days for every 30 served	180 days
Class I*- 75 days for every 30 served	Remainder of Sentence

*Inmates convicted of assault where the victim suffered the permanent loss or use or permanent partial loss or use of any bodily organ or appendage or inmates convicted of sexual abuse of a child under the age of 17 cannot be placed in Class I.

4. Good Time Deductions are Allowed for Time on Parole. § 14-9-42

"A deduction from a sentence provided for by this article shall be allowed for any time period served on parole. No deduction from a sentence provided in this article shall be used for determining an inmate's eligibility for parole.

Sentence Served Applying Correctional Incentive Time
Automatic Elevation – No Jail Credit

Sentence	Year	Month	Day
1 Year	—-	6	18
2 Years	—-	11	5
3 Years	1	2	18
4 Years	1	6	—-
5 Years	1	9	13
6 Years	2	—-	26
7 Years	2	4	9
8 Years	2	7	22
9 Years	2	11	5
10 Years § 14-9-41(e)	3	2	18
11 Years	3	6	—-
12 Years	3	9	13
13 Years	3	11	28
14 Years	4	4	9
15 Years	4	7	22
16 Years (Consecutive)	4	11	5
17 Years (Consecutive)	5	2	18
18 Years (Consecutive)	5	6	—-
19 Years (Consecutive)	5	9	13
20 Years (Consecutive)	6	—-	26
25 Years (Consecutive)	7	6	—-
30 Years (Consecutive)	8	11	5
40 Years (Consecutive)	11	9	13
50 Years (Consecutive)	14	7	22

B. Parole Policies Affect Sentence Length

The time actually served on a sentence is also determined by discretionary parole consideration dates that are superimposed on "good time" credits. These dates are determined a number of different ways depending on the length of the sentence, the crime at conviction, and the number of votes required for parole.

For prisoners receiving "good time," the first date for consideration of parole by majority vote of the Board is determined by the sentence of imprisonment imposed. An inmate *serving five years or less* is placed on the current docket. If the inmate is *serving more than 5 but less than 10 years* the approximate date for parole consideration is 12 months prior to the minimum release date; for those serving *more than 10 but less than 15 years*, approximately 24 months prior to the minimum release date; and for those serving *over 15 years*, 36 months prior to the minimum release date.

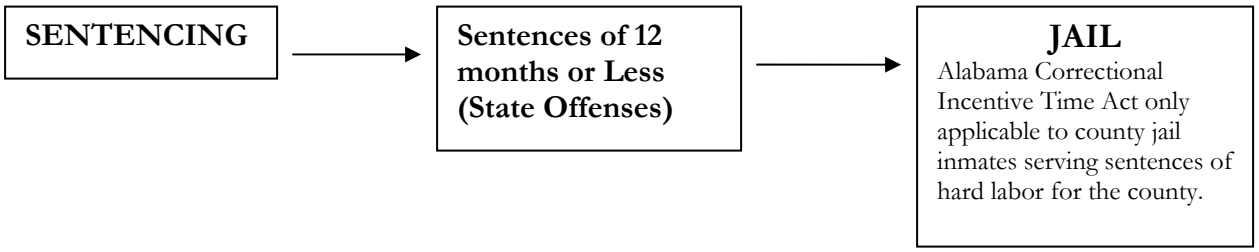
For most inmates not receiving "good time," the parole consideration date is set at the lesser of 1/3 of the sentence or 10 years. This parole consideration date is set by a majority vote of the Parole Board and applies only to certain offenders. The Parole Board's rules and regulations provide a different parole consideration date for serious offenders.

Serious offenders, those convicted of *murder, attempted murder, rape I, sodomy I, sexual torture, kidnapping I, or where serious physical injury occurred, robbery I, burglary I and arson I,* generally are not granted parole consideration until serving 15 years or 85% of the sentence, whichever is less. This rule is sometimes referred to as the Board's 85% rule. Realistically it is the "15 year" rule because 15 years is the parole consideration date for any offender sentenced to 18 years or more for the listed offenses.

The Board of Paroles can set earlier dates for parole consideration by *unanimous* vote of its three members. In exercising its broad discretionary authority, the Board could parole a prisoner as early as six weeks after sentencing, delayed only by the time required for investigations and notices to be completed.

The complexities of the various parole release dates will be simplified when the Sentence Reform Act of 2003 is fully implemented. According to the provisions of the Sentencing Reform Act of 2003, Act 2003-354, a mandatory term of supervised post-incarceration release will be required for felony offenders sentenced to a term of imprisonment, in addition to the period of incarceration imposed. This recommendation is made in recognition of the fact that offenders leaving prison need a supervised reentry program to reintegrate into the free world. During the last quadrennial, approximately 40% of Alabama inmates that were released from prison returned to the community after serving their sentence (referred to as "end of sentence" or "EOS") with no supervision or reentry plan in place.
See www.paroles.state.al.us for Board of Pardons and Paroles Rules and Regulations.

C. Summary of Alabama Parole and Good Time Laws



Sentences of More Than One Year

Department of Corrections "Good Time" Computations Inmates Start in Class IV

Class	Days Earned	Min. Time in Class
I	75days for 30	remainder of sentence
II	40 days for 30	180 days
III	20 days for 30	90 days
IV	-0-	30 days

Discretionary Parole Eligibility

Inmates Eligible for "Good Time"		Not Receiving "Good Time"	Serious Parole Eligible Offenders
Sentence	***Eligibility Date***	**As soon as practicable after eligible for release by majority vote – 1/3 of sentence or 10 years, whichever is less.**	**15 years or 85% of sentence, whichever is less.**
Up to 5 years	**Current docket**		
5-10 years	**App. 12 months prior to min. release date**		*** Murder, attempted murder, rape 1, sodomy 1, sexual torture, kidnapping 1 and if involving serious physical injury, arson 1, robbery 1, and burglary 1**
10-15 years	**App. 24 months prior to min. release date**		
Over 15 years	**App. 36 months prior to min. release date**		

VII. Alternative Sentencing

A. Straight Probation (not split)

For sentences of 15 years or less, the sentencing judge may suspend execution of the sentence and place the defendant on probation or "impose a fine within the limits fixed by law and also place the defendant on probation." §15-22-50, *Code of Alabama 1975.*

5 Year Limitation for Felons
3-Year Limitation Applies to Youthful Offenders
2-Year Limitation for Misdemeanants

For youthful offenders the term of probation may not exceed 3 years, including consecutive sentences. § 15-19-6, *Code of Alabama 1975; Jackson v. State,* 415 So.2d 1169 (Ala. 1994).

Revocation of Probation or Suspension of Execution of Sentence

"If the court revokes probation, it may, after a hearing, impose the sentence that was suspended at the original hearing or any lesser sentence, including any option listed in subdivision (1)." § 15-22-54(d)(2)

Credits Upon Revocation – Limit on Confinement
"If revocation results in a sentence of confinement, credit shall be given for all time spent in custody prior to revocation. Full credit shall be awarded for full-time confinement in facilities such as county jail, state prison, and boot camp. Credit for other penalties, such as work release programs, intermittent confinement, and home detention, shall be left to the discretion of the court, with the presumption that time spent subject to these penalties will receive half credit. The court shall also give significant weight to the time spent on probation in substantial compliance with the conditions thereof. The total time spent in confinement may not exceed the term of confinement of the original sentence." § 15-22-54(d)(3)

Grounds for Revocation
"The court shall not revoke probation and order the confinement of the probationer unless the court finds on the basis of the original offense and the probationer's intervening conduct, either of the following:

a. *No measure short of confinement will adequately protect the community from further criminal activity by the probationer.*
b. *No measure short of confinement will avoid depreciating the seriousness of the violation.*

§ 15-22-54(d)(4)

Upon revocation of probation, the court may split the original sentence, but the total time spent in confinement may not exceed the original maximum period the offender would have served under the original sentence, without regard to any deductions. *Parker v. State*, 648

So.2d 653 (Ala. Crim. App.1994); *Phillips v. State*, 755 So.2d 63 (Ala.Crim.App. 1996). See also Rules 27.2, 27.4, 27.5, Alabama Rules of Criminal Procedure.

Payment of Fines, Costs and Restitution

A court order to pay a fine, costs and restitution is an absolute liability and is not dependent on the probationary term and discharge from probation does not release the defendant from his or her obligation to pay. *Little v. State*, 693 So.2d 30 (Ala.Crim.App.1997).

Termination of Probation

The probationary period ends when the probationer either: (1) successfully fulfills the conditions of probation, or (2) receives a formal discharge from the trial court. *Sherer v. State*, 486 So.2d 1330 (Ala.Crim.App. 1986); *See also Young v. State*, 552 So.2d 879 (Ala.Crim.App. 1989). See Rule 27.3, Alabama Rules of Criminal Procedure.

B. Split Sentence

The split sentence is now used as the preferred sentencing option for over 40% of convicted felons. This statute may be utilized for any offender convicted and sentenced to a period of incarceration of 20 years or less, with the actual term of imprisonment as follows:

> Sentence of ***up to 15 years imprisonment - no more than 3 years actual confinement*** (which is not subject to parole or good time deductions), with remainder of the sentence suspended.
>
> Sentence of ***greater than 15 but not more than 20 years imprisonment - not less than three but no more than five years confinement*** which is not subject to parole or good time deductions but may be suspended in whole or part.

§ 15-18-8, *Code of Alabama 1975*.

1. Boot Camp

Section 15-18-8(a)(2), *Code of Alabama* 1975, authorizes a judge to sentence defendants convicted and sentenced under the split sentence statute to "boot camp" "upon consultation with the Commissioner of the Alabama Department of Corrections." These are military-style disciplinary and rehabilitation conservation programs that operate under the rules and regulations of the Department of Corrections.

Progress reports, advising whether the defendant has completed or not completed the program are provided to the sentencing court by the Department of Corrections. Upon receipt of these reports the sentencing court is authorized to :

- "suspend the remainder of the sentence and place the convicted defendant on probation;
- "order the convicted defendant to be confined to a prison, jail-type institution or treatment institution for a period not to exceed three years and that the execution of the remainder of the sentence be suspended and the defendant be place on probation for such period and upon such terms as the court deems best."[3]

When additional confinement is imposed, credit must be given for the actual time served in the program by the offender.

Excluded offenders – Offenders sentenced to life imprisonment without parole and offenders that are now, or have ever been convicted of the following offenses are prohibited from participating in the "boot camp" program:

- Murder;
- Rape in the first degree;
- Kidnapping in the first degree;
- Sodomy in the first degree;
- Enticing a child to enter a vehicle, house, etc., for immoral purposes;
- Arson in the first degree; and
- Robbery in the first degree

2. <u>Certain Enhancements Can Be Suspended</u>

Mandatory Minimums No Longer Mandatory After Amendment of Alabama's Split Sentencing Statute For Sentences of 20 years or Less

***Soles v. Alabama*, 820 So.2d 163 (Ala.Crim.App. 2001)**

The recent amendment to Alabama's split sentencing statute (effective 5/25/01) supersedes the prohibitions against probation of the 5 year mandatory enhancement provisions in § 13A-12-250 and § 13-12-270 for the sale of drugs within 3 miles of a school or housing project and allows a trial court to suspend sentences of 20 years or less. *See also Tucker v. State*, 833 So.2d 668 (Ala.Crim.App. 2001).

In *Soles*, the Court of Criminal Appeals held that Alabama's split sentencing statute (§ 15-18-8), as last amended, allows a trial court to suspend a sentence imposed upon application of the five year enhancement statutes for persons convicted of the unlawful sale of a controlled substance within three miles of a school or public housing project. Although the *Soles* case only involved enhancements pursuant to the 3-mile radius statutes, applying the same rationale to other enhancement statutes (firearm enhancement, domestic violence, hate crimes, DUI, enticing a child to enter a vehicle, house, etc., and drug trafficking), would apparently lead to the same conclusion because the amendment of the split sentencing statute was the latest expression of the Legislature on the subject.

C. Felony DUI

Confinement May be in County Jail if Sentence Does Not Exceed 3 Years[4]
The minimum sentence shall include a term of imprisonment for one year and one day, of which 10 days is mandatory. The remainder of the term of imprisonment can be suspended or probated if the defendant is placed on probation and a condition of probation is that (s)he "enrolls and successfully completes a state certified chemical dependency program recommended by the court referral officer and approved by the sentencing court." § 32-5A-191(h).

The Felony DUI statute specifically provides that, where the defendant is granted probation, "the sentencing court may, in its discretion, and where monitoring equipment is available, place the defendant on house arrest under electronic surveillance during the probationary term." § 32-5A-191(h).

D. Community Corrections

1. Community Corrections and Punishment Act

Title 15, Chapter 18, Article 9, *Code of Alabama 1975*.

Notwithstanding any law to the contrary, judges are authorized to sentence eligible offenders to appropriate community-based punishment programs either in conjunction with a split sentence, as an alternative to prison, or as a condition of probation. In sentencing offenders to any community-based alternative program, the court is authorized to set the duration of the sentence for the offense committed "to any period of time up to the maximum sentence within the appropriate range for the particular offense." § 15-18-175(d), *Code of Alabama 1975*.

The purpose of community corrections is to provide services that expand the options available for the supervision and sentencing of criminal defendants. The various components of community corrections programs target different offender groups or offenders, for services within the various levels of the criminal justice system including misdemeanants, pretrial, therapeutic courts (i.e. pre-sentence or pre-effective date of sentence) and post-sentence (i.e. prison diversions up-front and back-end). Components most often include pretrial supervision, drug court and client specific alternative sentencing with several counties expanding their outreach to include mental health court, community service, victim/offender mediation and services (i.e. GED preparation, cognitive skills training, drug education).

Act No. 2003-353, the Community Corrections and Punishment Act of 2003, effective 7/30/03, implements changes in Alabama's Community Corrections Act to ensure accountability and to encourage the growth of local community corrections programs as alternatives to prison incarceration. These changes recognized that state appropriations for community corrections can be used as start-up grants for local

programs as well as the operation of continuing programs and authorizes counties to establish community correction programs by passage of resolution, rather than establishing non-profit authorities. The other key initiatives in this Act are the creation of a separate community corrections division in the Department of Corrections with a full-time director and support staff and the creation of the State-County Community Partnership Fund as an identifiable fund to receive appropriations for community corrections programs, with monies appropriated to this Fund earmarked solely for community corrections. Another major provision of this Act was the appropriation of $5.5 million for community corrections programs. Although this provision was amended out of the bill, Commission staff was given assurances by key legislators that it would be included in the General Fund Budget, which will be considered in a special session of the Legislature later this summer. As this bill traveled through the Legislature the initiative to build more community punishment alternatives began to grow, with members of Governor Bob Riley's staff working with the Department of Corrections and Department of Mental Health to develop plans for five transition centers for inmates diverted from prison or ending their term of incarceration. Perhaps, through necessity, alternative sanction programs and reentry programs are finally coming to fruition in Alabama.

The Community Corrections programs in Jefferson and Mobile Counties are two of the oldest and most comprehensive in the state providing most of the services set out above. Neither have an in-house work release center or detention center, as do some other programs, i.e. the Shelby County program and the Fayette, Lamar and Pickens County program. The following profile of participants in a community corrections program may be helpful in determining who is served in this type of alternative sentencing program. The two groups described are from the Mobile County Jail Diversion Program and the Mobile County Alternative Sentencing Program. It is noted that Mobile County Community Corrections serves as the Court Referral Officer for Mobile County.

In Mobile County Jail Diversion (county probation for misdemeanors) is a formal probationary program that provides a high level of supervision including monitoring the offender, the enforcement of court ordered probationary conditions and the opportunity for self-improvement and rehabilitation. Referrals are received from District and Circuit Court, as well as, courtesy supervision from other states.

The Alternative Sentencing Program identifies certain felony offenders who can be punished safely within the community by utilizing sentencing options that range from probation to incarceration. There are different requirements that qualify an offender for the program; felony charge, youthful offender status, prison bound, safely punishable within the community or facing probation revocation. By offering an individualized plan for offenders, the Alternative Sentencing is striving to ease prison overcrowding, decrease the rates of recidivism and lower the cost of punishment.

Ineligible Offenders

Any person convicted of the following felony offenses is ineligible for community corrections punishment: (1) murder, (2) first degree kidnapping, (3) first degree rape, (4) first degree sodomy, (5) first degree arson, (6) selling or trafficking in controlled substances, (7) first degree robbery, (8) first degree sexual abuse, (9) forcible sex crimes, (10) lewd and lascivious acts upon a child and (11) first degree assault that leaves the victim permanently disfigured or disabled. § 15-18-171 (13), *Code of Alabama*, 1975, as amended by Act 2003-353, § 15-18-171(14).

> Non-violent offenders who would ordinarily be incarcerated in a correctional institution,

or who are currently in a correctional institution, may be considered for community corrections under Title 15-18-170 Code of Alabama (1975). The alternatives contemplated by this Act include, among other things: community detention centers, inpatient or outpatient drug/alcohol treatment, intensive supervision probation, electronic surveillance, community detention and restitution centers, and other programs.

Under Title 15-18-180 (f) the inmate's employer must send the inmate's wages directly to the county or its designated agent: 25% of the wages are applied to the costs of the inmate's confinement, and a minimum of 10% is allocated to payment of court costs and other court ordered assessments, and a minimum of 10% to payment of restitution. The remainder of the inmate's wages may be credited to his account for the support of his dependents, savings, and spending money.

2. Community Service

Community services has become a popular form of punishment as an alternative to, or in conjunction with, sentences or imprisonment. There, is however, no statutory authorization for the imposition of community service except for cases of a second DUI conviction within a five year period. In lieu of the mandatory minimum five days confinement required for such an offense, the judge is authorized to impose not less than 30 days of community service.

3. Drug and Alcohol Treatment

Alabama's Mandatory Treatment Act of 1990, Title 12-23-1 et. Seq. Code of Alabama (1975) authorizes the establishment of Court Referral Officers (CRO) in every circuit.

All courts exercising jurisdiction over alcohol and drug related offenses are authorized to refer a defendant to a CRO for evaluation and referral to an appropriate education and/or treatment program.

When drug or alcohol treatment is made a condition of probation and combined with random drug screening and/or frequent reporting to the CRO, this may be an effective alternative to prison.

Under Title 12-23-5 any person arrested or charged with VPCS, or VPOM I or VPOM II, and who otherwise meets the statutory criteria, may request to enroll in a drug treatment program in lieu of undergoing prosecution. If the person complies with all of the conditions of such a diversion program, the charges are dismissed.

E. Pretrial Services

Common eligibility criteria: Incarcerated pretrial defendants who can be released if provided pretrial supervision.

Jail overcrowding is a common problem in the majority of the state's counties. In 1998, Jefferson County faced legal action in a long-standing federal lawsuit brought against it as a result of dangerously overcrowded conditions in its two detention facilities. In response, the County Commission funded a justice system study to examine the criminal justice process within the jurisdiction. Results found that court and jail crowding "resulted from system delays due to management problems (including a lengthy adjudication process and coordinated pretrial services), rather than from increases in population, crime or arrests."[5] In order to address system shortfalls, a series of initiatives including enhanced pretrial services were implemented. As a result, the jail population was reduced and construction of a new jail facility was tabled indefinitely. During FY 2001, the Jefferson County Community Corrections Program interviewed 1,368 and released 1,017 offenders into community supervision on recognizance bonds.

Programs to effectively manage offenders in the community are critical to controlling the local jail population. Without community corrections' pretrial efforts, many offenders would have remained incarcerated and aggravated an already critically overcrowded jail. By assisting the judiciary in providing alternative means of supervision, limited jail space has been more efficiently utilized. Further, the monitoring of pretrial arrestees encourages a greater probability of compliance with the conditions of release and reduces the probability of rearrest on a new offense.

Pretrial services offers case management, criminal justice supervision, electronic monitoring, random urinalysis and drug treatment services. Trained staff members thoroughly assess defendants for drug use as well as criminal history, employment, housing and mental illness. Through these assessments, substance abuse issues, public safety risk and ancillary concerns are identified and addressed in the defendant's release plan. Utilizing its linkage system, the programs serve as brokers to an enhanced continuum of community based substance abuse treatment and other services. Offender compliance is reported directly back to the court.
According to the defendant's charge, criminal history and/or diagnosis, he/she may be referred directly to available drug courts, deferred prosecution or mental health courts.

F. Therapeutic Courts

Common eligibility criteria: (1) Admission into drug court requires a drug-related, non-violent offense. (2) In order to be eligible for mental health court, the individual must have a recent Axis I diagnosis (i.e. schizophrenia, bipolar disorder) and a non-violent charge. Additional eligibility criteria may apply to local programs.

According to the Bureau of Justice Statistics, approximately 283,800 mentally ill offenders were incarcerated in the nation's jails and prisons as of June 30, 1998. Sixteen percent of those in local jails reported either a mental condition or an overnight stay in a mental hospital. In addition, 65 percent of adult males arrested within Jefferson County, Alabama, in 2000 tested positive for an illegal substance.[6] This includes 72 percent of those arrested for property offenses and 65 percent of those arrested for drug related charges.

Therapeutic courts, such as drug court and mental health court, are designed to meet the specific needs of defendants who are drug involved and/or seriously mentally ill through an enhanced array of services including intensive offender supervision, judicial oversight and expanded program requirements (i.e. community service, employment, medication compliance). Through the collective efforts of the defense attorney, prosecutor, community corrections staff members and the presiding judge, eligible participants are identified at multiple points in the system and placed in the therapeutic court program.

Community corrections case managers conduct assessments and track the progress of each offender. Based upon the treatment needs of the individual, referrals are provided to treatment interventions including community mental health, outpatient treatment, residential placement, cognitive skills instruction, AA/NA/Double Trouble support groups and drug education. Case managers maintain frequent contact with defendants and treatment providers to verify compliance. Abstinence is monitored by mandatory random drug testing throughout the duration of the program. Participants are scheduled for routine judicial reviews that integrate mental health and/or drug treatment compliance and urine screening with judicial case processing.

Therapeutic courts strategically incorporate a positive and timely reward system. Participants who abstain from drug use and meet program requirements receive positive feedback from the presiding judge and a reduction in random drug testing, judicial reviews and daily reporting. Participants who are unable to meet program requirements are returned to the traditional judicial case processing system or sentenced to prison. Offenders remain in the court programs for an average period of twelve months. Successful completion of program requirements culminates in a graduation ceremony and, in many cases, the dropping of the charge.

G. Post-Sentence Programs

Common eligibility criteria: Offenders who require more supervision and services than provided by probation but less than those found in prison (intermediate punishment).

Organized under the Community Corrections Act and funded by the Alabama Department of Corrections, post-sentence programs, or alternative sentencing, targets non-violent, prison-bound offenders. The purpose of these programs is to:

- Provide services that expand the options available for sentencing defendants
- Furnish punishments that allow judges the option of maintaining the offenders' residence in the community, making restitution to victims or repaying the community through community service
- Provide enhanced supervision options between traditional probation supervision and prison
- Reserve limited prison space for violent offenders by supplying options that allow non-violent offenders to remain in the community
- Establish links to existing community services
- Provide sanctions that incorporate the victim's need for restitution, the community's need for punishment and the offender's individualized need for supervision and treatment

In order to meet these objectives, designated community corrections staff design Client Specific Alternative Sentencing Plans based on the defendant's treatment needs, public safety risk, previous criminal history and personal resources. These plans integrate innovative sentencing strategies such as residential drug treatment, community service, electronic monitoring, shock sentencing and victim restitution as alternatives to incarceration. Plans are submitted to the court for review. Contracts with community-based residential and half-way facilities assist offenders in accessing treatment resources.

VIII. SENTENCING STANDARDS

A. WHAT

In compliance with the directives included in the Sentencing Reform Act of 2003, the Alabama Sentencing Commission developed voluntary sentencing standards or recommended sentences for the most frequent felony crimes of conviction. These recommended sentences will provide judges with additional information and direction in lieu of the wider ranges currently available under existing statutory law.

The recommendations or "standards" as they are called are voluntary, non-appealable, historically based, time imposed, sentencing recommendations developed for 26 felony offenses, representing 87% of all felony convictions and sentences imposed in Alabama over an approximate five-year period from October 1, 1998 through May 31, 2003. The standards are recommended sentence ranges and dispositions for the covered offenses that recognize the impact of key factors normally considered by judges in imposing sentences.

The standards represent the "normal" case containing the recognized sentencing factors. Of course, other factors will undoubtedly exist in about 25% of sentenced cases, in which judges are expected to take those factors into consideration and impose either a harsher or more lenient sentence than that recommended. It is expected that use of the standards will result in more informed sentencing, greater uniformity in sentencing and the elimination of unwarranted sentencing disparity.

Legislation proposing the sentencing standards has been introduced during the 2004 and 2005 Regular Sessions and will be introduced again in the 2006 Regular Session.

B. WHY

The Alabama Legislature has recognized a need for sentencing reform in this state. A study conducted by the Vera Institute of Justice, found that there was a 326% increase in the rate of incarceration in Alabama between 1979 and 2000.

Alabama had twice as many property crimes admissions per 100 arrests between 1983 and 1992 as the national average. Drug offenders represent the largest percentage of offenders entering Alabama prisons.

Data available through 2000 in regards to incarceration rates (representing the number of sentenced prisoners per 100,000 population), indicates that Alabama's incarceration rate ranked well above the national average and fifth among all 50 states surveyed.

Recognizing the overcrowding of our prisons in Alabama, and the demands on our public resources, the Alabama legislature has created the Alabama Sentencing

Commission to recommend changes in Alabama's criminal justice system. Such recommendations must, among other things, secure public safety, provide certainty and fairness in sentencing, avoid unwarranted sentencing disparities, and prevent prison overcrowding and premature release of prisoners.

The Sentencing Commission is charged with recommending changes which "maintains judicial discretion and sufficient flexibility to permit individualized sentencing as warranted by mitigating and aggravating factors."

After studying the work of sentencing commissions from around the country, the Alabama Commission decided to recommend Voluntary Sentencing Guidelines for use by trial judges in this state. The guidelines will provide the judges information needed to make informed sentencing decisions in the exercise of their discretion.

These are Voluntary and Non-appealable sentencing guidelines and are nothing like the mandatory or presumptive guidelines adopted by some states and the federal courts.

C. When

The Initial "Time Imposed" Sentencing Standards have failed to pass the Legislature for the last two years, but will be introduced again during the 2006 Regular Session. If the Legislature approves the recommendations of the Sentencing Commission, additional workshops will be conducted to instruct trial judges, probation officers and defense attorneys in the completion of worksheets prior to implementation of the standards in October of 2006. These worksheets will enable judges to score the offender's criminal history and arrive at a recommended sentence. These standards include two sets of worksheets – one to determine the sentence disposition (prison or non-prison) and the other for the length or duration of the sentence.

The second set of standards, the "Time Served" standards will implement Truth-in-Sentencing in Alabama, adopting a system which 1) sets a minimum mandatory time a defendant will have to serve; 2) will adopt "bad time" in lieu of "good time" for additional time to be added on to a sentence for disciplinaries; and 3) require one year of post-incarceration supervision for every felony offender leaving prison. The system will alter "parole and good time" as we know it, but will not abolish the Parole Board.

IX. CASES

CRUEL AND UNUSUAL PUNISHMENT

Trafficking Sentence for First Offender held to be Unconstitutional as Cruel and Unusual Punishment

Trafficking in morphine, 13A-12-231(3)(d), mandating imposition of a life without parole sentence for a first-time drug offender is unconstitutional under the 8th Amendment prohibition against cruel and unusual punishment.
Wilson v. State, 830 So.2d 765 (Ala.Crim.App. 2001)

Execution of Mentally Retarded

The Eighth Amendment prohibits execution of mentally retarded person. *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L. Ed. 2d 335 (2002)

Execution of Child
"The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper v. Simmons*, 125 S.Ct. 1183 (2005).

Hitching Post Case – No Immunity for Alabama Prison Guards

An Alabama prison inmate that was handcuffed to a hitching post by Alabama prison officials for disruptive conduct filed this § 1983 lawsuit against three guards alleging that his 8th Amendment rights were violated. Without deciding whether this action was an 8th amendment violation, the Magistrate Judge found that the guards were entitled to qualified immunity. The District Court for the Northern District of Alabama, entered summary judgment for the respondents and the Court of Appeals for the 11th Circuit affirmed.

The United States Supreme Court reversed, holding that the inmate was subjected to cruel and unusual punishment in violation of the 8th Amendment and the prison guards were not entitled to the defense of qualified immunity in light of a prior warning by the Department of Justice of the constitutional infirmity of the use of a hitching post by Alabama's Department of Corrections, DOC's regulation governing use of the hitching post and binding 11th Circuit precedent. *Hope v. Pelzer*, et al., 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (S.Ct. 2002)

DOUBLE JEOPARDY

Double Jeopardy - Finding of Guilty When Crime *Thought* to be Lesser Included Offense

"[A] defendant that proceeds to the conclusion of a criminal trial in which the jury, under instructions expressly finds the defendant not guilty of the offense charged in the indictment, but finds him guilty of an offense not contemplated by the indictment, resulting in a void conviction, may not be retried for the charged offense of which he has been acquitted." In this case the defendant's conviction for second degree assault under an indictment charging Robbery 1st was reversed, with the Court holding that his conviction of second degree violated the double jeopardy clause.
Ex parte State of Alabama (In re:Robert Bradley), 2005 WL 2472279 (Ala. 10/7/05)

One Conviction – Alternative Means of Proving Crime

A defendant cannot be convicted of both a capital offense and a lesser offense included in the capital charge.
Carruth v. State, 2005 WL 2046334 (Ala.Crim.App. 2005).

Conviction of eight counts of capital murder arising out of killing three people violated constitutional prohibition against double jeopardy.
Castillo v. State, 2005 WL 1252731 (Ala.Crim.App.2005)

Conviction for both capital murder and intentional murder based on killing one victim was in violation of double jeopardy prohibition.
Cooper v. State, 912 So.2d 1150 (Ala.Crim.App. 2005).

Two murder convictions arising out of a singe incident and involving a single victim violated prohibition against double jeopardy and could not be remedied by lording concurrent sentences.
Banks v. State, 2005 WL 628236 (Ala.Crim.App. 2005); *Loggins v. State*, 910 So.2d 146 (Ala.Crim.App. 2005).

Double Jeopardy prohibits multiple convictions and multiple sentences for felony-murder if the convictions arise from a single killing.
Hardy v. State, 2005 WL 182824 (Ala.Crim.App. 2005).

DRUG COURTS

Legal Authority

While the Court's decision in *Ex parte Webber* never reached the merits of the case, there was a good discussion of the court's authority to dismiss a case over the prosecutor's objections when a defendant participates in a drug court program operated as a part of the local DA's pretrial diversion program or pursuant to the Mandatory Treatment Act (§ 12-23-5, Code of Alabama 1975). In her dissenting opinion, Justice Stuart noted that Rule 13.5 (c)(1) of the Rules of Criminal Procedures providing for dismissal of indictments does not provide a basis for dismissal of a case due to successful completion of drug court, and that the decision to permit a defendant to complete a treatment program in lieu of prosecution pursuant to provisions of the Mandatory Treatment Act or local pre-trial diversion act for Montgomery County is "solely within the prosecutor's discretion."

In her dissent Justice Stewart addressed the role of the courts and prosecutors in regard to drug courts and the legal authority for such courts:

> "Additionally, I note that it appears that the trial court's drug-court program was not authorized by the Legislature or conducted under the parameters of the legislatively authorized pretrial- diversion program for the Fifteenth Judicial Circuit. While I find it meritorious that a trial court would invest its time engaging in a drug-court program by conducting biweekly reviews of a defendant's drug treatment, participation in counseling sessions, etc., such a program *must* fall within lawful parameters. A trial court does not represent the people; the State does. It is not the trial court's responsibility to determine whether a case should be prosecuted. It is the trial court's responsibility to pronounce the judgment and to sentence the wrongdoer. Rule 26.9, Ala.R.Crim.P. The trial court in this situation usurped the authority of the State and invaded the province of the executive branch." (emphasis in original)

Ex parte Webber, 892 So.2d 869 (Ala. 2004)

C.D.C. v. State, 821 So.2d 1021 (Ala.Crim.App. 2001)

The prosecutor's decision to refer a defendant to drug court as an alternative to prosecution pursuant to § 12-23-5, Ala.Code 1975, is solely within the prosecutor's discretion and is not subject to appellate review.

GUILTY PLEA

Guilty Plea - Withdrawal

Pursuant to a plea agreement that the defendant would be sentenced to 15 years imprisonment and that he could apply for probation, which the State would recommend, the defendant entered a guilty plea to first-degree rape. Through a guilty plea colloquy, the court questioned the defendant at length regarding his understanding of the plea agreement to ensure that he understood the State was promising to make a recommendation of probation, but that there was no guarantee the court would follow this recommendation and grant his request. The trial court sentenced the defendant to 15 years, as set out in the plea agreement, but postponed a decision on his probation request. Prior to the probation hearing, the defendant filed a motion to withdraw his guilty plea, which the trial court denied. Relying on *Brown v. State*, 495 So.2d 729 (Ala.Crim.App. 1986), the Court of Criminal Appeals reversed the trial court's denial of the defendant request to withdraw his guilty plea, holding that this was a bargained for sentencing recommendation which the court did not follow, denial of which resulted in reversal. *Nelson v. State*, 866 So.2d 594 (Ala.Crim.App. 2002), certiorari denied, 866 So.2d 599 (Ala. 2003).

Illegal Alien - No Notice of Possible Deportation Required

Rejecting the defendant's argument that his attorney was ineffective because he was not informed of the possibility of deportation, the Court of Criminal Appeals held that because deportation was not a direct consequence of the plea, the petitioner was not required to be advised of the possibility that the United States Immigration and Naturalization Service (a department over which the judge has no authority) may deport as a result of his guilty plea. *Rumpel v. State*, 847 So.2d 399 (Ala.Crim.App. 2002).

Factual Basis

"The only factual basis required for a guilty plea is that which will satisfy the court that the appellant knows what he is pleading guilty to. … The factual basis [can be] established, in part, by the appellant's admission that he knew to what offense he was pleading guilty…. Likewise, the reading of the indictment [is] sufficient to establish a factual basis for a guilty plea in certain cases, (and) in those cases it is not required that the indictment be read into the record during the guilty plea hearing."
Scott v. State, 2005 WL 995423 (Ala.Crim.App. 2005).

JURISDICTION

Trial Court's Jurisdiction To Amend Sentence – 30 Day Rule
In the absence of a motion for a new trial or a request to modify a sentence, filed within 30 days after sentencing, the trial court loses jurisdiction to modify a defendant's sentence at the end of the 30th day. *Ex parte Hitt*, 778 So.2d 159 (Ala. 2000); *Moore v. State*, 814 So.2d 308 (Ala.Crim.App. 2001).

In *Moore*, the Court of Criminal Appeals noted the Criminal Rules appear to extend the time for reconsideration to change sentences from consecutive to concurrent. "Rule 26.12(c) Ala.R.Crim.P, appears to give a trial court some leeway to amend a sentence order after the 30-day jurisdictional period had expired. '*Reconsideration. The court may at any time by a nunc pro tunc order provide that previously imposed consecutive sentences run concurrently.'* The committee comments to Rule 26 state: *'Section (c) allows the judge discretion to, at any time, amend a sentence order to permit a sentence to run concurrently with another sentence.'* However, Rule 26.12 does not authorize the trial court to amend a sentence order to change a concurrent sentence to a consecutive sentence.'" *Moore* 814 So.2d, 308, 309

Consecutive vs. Concurrent

Unless a defendant is advised that consecutive sentences might be ordered, his guilty plea is not voluntarily and knowingly entered. *Taylor v. State*, 846 So.2d 1111 (Ala.Crim.App. 2002).

While Rule 26.12 Ala.R.Crim.P., grants a trial judge discretion to amend a sentence order to permit a sentence to run concurrent with another sentence, it does not authorize the trial court to amend a sentence order to change a concurrent sentence to a consecutive sentence. *Moore v. State*, 814 So.2d 308 (Ala.Crim.App. 2001); *Phillips v. State*, 2005 WL 628494 (Ala.Crim.App. 2005)

Court Has No Jurisdiction to Consider Successive Kirby Motions

> "[O]nce a circuit court has considered one motion for reconsideration of sentence filed by a defendant in a particular case, the defendant's rights with regard to that case will have been sufficiently safeguarded. Thereafter, the circuit court will not have jurisdiction to consider any second or successive motions for reconsideration filed by that defendant in that particular case. Instead, it should summarily deny any such motion."

Wells v. State, 2005 WL 2810756 (Ala.Crim.App. Oct. 28, 2005).

Restitution and Fines Can Only Be Modified Within 30 Days of Final Order

The Court of Criminal Appeals held that the trial court lacked jurisdiction to modify its original order and increase the restitution and crime victim's compensation owed by a defendant in exchange for probation since the final order issued was over 30 days. The Court opined, "Restitution and a statutory assessment, like a fine, are components of a sentence. Therefore, we hold that a final restitution order, like a sentencing order, can only be modified within 30 days of the order's becoming final; the same is true of the amount of a statutory assessment."

Contempt Not Applicable to Require Restitution of Indigents

Holding that the trial court did not have jurisdiction to issue a contempt order against an indigent defendant for failure to meet the court ordered restitution order, the Court of Criminal Appeals stated:

> "Nowhere in our case law, statutes or rules will a case of constructive contempt lie for the inability to pay a debt owed to a creditor or, in this case a victim. Rather a suit is commenced, a judgment is obtained and executed, and a lien is imposed or wages are garnished. That is, the victim takes advantage of his or her civil remedies; the court does not act as an enforcer and compel payment to the victim through the imposition of a criminal penalty upon the indigent debtor."
>
> …
>
> "In order to hold a person in contempt, a court must have jurisdiction over the person and the subject mater…Our law does not contemplate that this type of contempt action will lie in order to circumvent the clear prohibition in Rule 26.11(I)(2) against jailing an indigent defendant for his or her inability to pay court-ordered moneys."

Dixon v. State, 2005 WL 995452 (Ala.Crim.App. 2005).

Essential Elements of Offense Charged in Indictment

Failure to allege an essential element of the charged offense is a jurisdictional defect that renders the indictment void. *Ex parte Lewis*, 811 So.2d 485 (Ala. 2001)

Scienter must be alleged in an indictment charging a person with a statutory crime. *Ex parte Harper*, 594 So.2d 1181 (Ala. 1991) (holding that "knowingly" was an essential element of the offense of the unlawful distribution of a controlled substance and must be alleged in the indictment)
See also Ex parte Lewis, 811 So. 2d 485 (Ala. 2001) and *Sullens v. State*, 2003 WL 1408529 (Ala.Crim.App. 2003).

Receiving Stolen Property
An essential element of the crime of "receiving stolen property" is that the defendant "*intentionally* receive[d], retain[ed], or dispose[d] of stolen property," and failure include the word "*intentionally*" in front of the words "receive, retain, or dispose" made the indictment void for failure to charge an essential element of the offense that cannot be waived. The Court noted the elements of the offense of first-degree receiving stolen property as follows: "First, a person must intend to receive, retain, or dispose of the property in question. Second, the property must be stolen. Third, a person must know, or have reasonable grounds to believe, that the property is stolen. Fourth, the property must not have been retained or disposed of with the intent to restore it to the owner. Finally, in order for the offense to be in the first-degree, the property must be valued at $1,000 or more. For an indictment to adequately charge a defendant with the crime of first-degree receiving stolen property, the indictment must contain all six essential elements. Because it is lacking the first element, the indictment in the present case is not sufficient to charge Cogman with any offense." *Cogman v. State*, 870 So.2d 762 (Ala.Crim.App. 2003).

Mandamus Does Not Affect Without Stay of Judgment
Challenging the trial court's authority to dismiss a case after the defendant had successfully completed a drug court program, the State filed a writ of mandamus. Noting that the State did not obtain a stay of final judgment the Alabama Supreme Court dismissed the petition as moot. The Supreme Court held that the trial court lost subject matter jurisdiction after expiration of the 30 day period following the judgment of dismissal. *Citing Ex parte St John*, 805 So.2d 684 (Ala. 2001), the Court opined that "the filing of a petition for a writ of mandamus against a trial judge does not divest the trial court of jurisdiction, stay the case, or toll the running of any period for obeying an order or perfecting a filing in the case."
Ex parte Webber, 892 So.2d 869 (Ala. 2004)

JURY INVOLVEMENT IN SENTENCING

Jury Determination for Enhancement – The Beginning

In Apprendi, a defendant had pled guilty to unlawful possession of a firearm, which carried a maximum statutory sentence of ten years in prison. In the sentencing proceeding, the judge conducted an evidentiary hearing and found that Apprendi had committed the crime with the purpose of intimidating others based on race, etc. Pursuant to a separate hate crime statute, that finding enhanced Apprendi's statutory maximum sentence to 20 years. The Supreme Court held the state procedure unconstitutional, ruling that **"[o]ther than the fact of a prior conviction, any *fact* that *increases* the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt**." 530 U.S. at 490 (emphasis added).

The Court also held that a state hate crime statute which authorized increase in maximum prison sentence based on judge's finding by preponderance of evidence that defendant acted with purpose to intimidate victim based on particular characteristics of victim violated due process clause.
Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435(2000).

Washington's Presumptive Sentencing Guideline System Held Unconstitutional
Following the *Apprendi* decision, the United States Supreme Court subsequently held that Washington's sentencing guideline scheme violated the Sixth amendment by giving judges, rather than juries the authority to make factual determinations necessary to enhance sentences. This case struck down the "exceptional sentence" provisions in Washington's presumptive guideline system. Under this system a judge could depart from the guidelines if he found by a preponderance-of-the-evidence that an aggravating factor existed. The Court held that when a sentencing system imposes an upper sentencing threshold, effectively creating a maximum sentence, any fact that would increase a sentence beyond this maximum, like the elements of the offense, must be submitted to the jury and proven beyond a reasonable doubt.
Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Mandatory Federal Guidelines Now Voluntary
Applying Blakely to the federal sentencing guidelines, the United States Supreme Court held that the mandatory portions of that sentencing system were unconstitutional. The Court reaffirmed its holding in Apprendi that "[A]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved by a jury beyond a reasonable doubt."
United States v. Booker, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)

Prior Conviction Exception
The Apprendi/Blakely/booker cases do not require prior convictions used for enhancement to be alleged in the indictment and proved by a jury beyond a reasonable doubt.
United States v. Escobar, 2005 WL 309637 (11th Cir. 11/21/05)

Pleading Must Contain Aggravating Factors Used to Enhance – But Failure to Include in Indictment Not Plain Error

The defendants were convicted of conspiracy to commit various drug offenses. They appealed and the 4th Circuit Court of Appeals affirmed the convictions, but vacated the sentences and remanded. On certiorari, the U.S. Supreme Court held that although the failure of the indictment to include any allegation regarding the quantity of drugs involved in the alleged conspiracy violated the Apprendi rule and thus rendered the

defendants' enhanced sentences erroneous, the error did not rise to the level of plain error. Reversed and remanded. *United States v. Cotton*, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed. 2d 860(S.Ct. 2002)

Apprendi Not Extended to Mandatory Minimum Sentences

The Supreme Court declined to extend the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to mandatory minimum sentencing schemes, holding that increases in the minimum sentence for an offense without increasing the maximum sentence may be treated as a sentencing factor rather than as an element of the offense. In *Harris* the defendant plead guilty to distributing marijuana and was convicted after a bench trial of carrying a firearm in relation to a drug trafficking offense. At the sentencing hearing, the judge found that the defendant had "brandished" the weapon and consequently sentenced the defendant to the mandatory minimum sentence. The 4th Circuit Court of Appeals affirmed, and the United States Supreme Court agreed, holding that "brandishing" a firearm is a sentencing factor rather than an element of the crime, thus the judge was permitted to make the factual determination without jury involvement.
The Court noted that the statute criminalizing carrying of a firearm in relation to a drug trafficking offense set forth a single offense, in which "brandishing" and "discharging" are mere sentencing factors to be found by the judge, rather than elements of the offense to be found by a jury.

This decision has been cited by opponents of mandatory minimum sentencing statutes as underscoring the need to end mandatory minimum sentences. Emphasizing that part of Justice Breyer's concurring opinion commenting on mandatory minimums, the Families Against Mandatory Minimums quoted the following statement in their press release: "Mandatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of the Sentencing Guidelines. They transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created the Guidelines to eliminate. Applying Apprendi in this case would not, however, lead Congress to abolish or to modify such statutes, and it would take from the judge the power to make a factual determination while giving that power not to juries, but to prosecutors." *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406 (S.Ct. 2002)

Finding of Aggravating Factors in Capital Case Must be Determined By Jury

The defendant was convicted of first-degree murder, conspiracy to commit armed robbery, and armed robbery. He was sentenced to death. On appeal, the Arizona Supreme Court affirmed. The United States Supreme Court reversed, holding that the Arizona death penalty scheme improperly empowered a trial judge in a capital case to determine the presence of aggravating factors required to be present by Arizona law in

order for the death penalty to be imposed. *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (S.Ct. 2002)

Jury Involvement in Sentencing – Weighing of Aggravating and Mitigating Circumstances in Death Cases Not Factual Determination For Jury Under *Ring*

In a death penalty case, determining whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or element of an offense that would have to be determined by the jury under the United States Supreme Court's decision in *Ring v. Arizona*, 122 S.Ct. 2428 (2002). *Ring* only requires that a jury, not the sentencing judge, make the factual determination that aggravating circumstances necessary for imposition of the death penalty exist. In this case, the jury found the existence of one aggravating circumstance – all that is required under Alabama law to sentence a defendant to death. The trial court's later determination that the murders were especially heinous, atrocious, or cruel, was found to be only a factor that had application in weighing the mitigating and aggravating circumstances. *Ex parte Waldrop*, 859 So.2d 1181(Ala. 2002); *Lee v. State*, 889 So.2d 623 (Ala.Crim.App. 2003).

Apprendi Decision Applied to Alabama Law

Death Penalty - Alabama Judicial Override

Apprendi Not Extended to Proof Prior Convictions

The decision of the United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584(S.Ct. 2002), extending *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to capital sentencing, did not require proof beyond a reasonable doubt of aggravating factors of a prior conviction. *Ex Parte Smith*, 2003 WL 1145475 (Ala. 2003)

Drug Sale Enhancements Need not be Alleged in Indictment

The locale of drug sales that could result in application of the enhancement provisions of the 3-mile radius statutes does not have to be alleged in the indictment since it is not an element of the offense of distributing a controlled substance. Citing Poole v State, 846 So.2d 370 (Ala.Crim.App. 2001), the Court of Criminal Appeals reiterated, "We do not believe that the Supreme Court intended to impose presentment and indictment requirements on the individual states' rights to define criminal activity." In Poole, the Alabama Court of Criminal Appeals held that Apprendi error (failure to submit fact increasing punishment, other than prior convictions, to a jury to be proved beyond a reasonable doubt, only invalidates the defendant's sentence, not the underlying conviction. The Court refused to adopt the defendant's position that facts elevating a sentence above the statutory maximum must be alleged in the indictment, advising that trial courts should submit 2 verdict forms to the jury – one addressing guilt on the charge (in this case, distribution of controlled substances), and the other whether the sale

occurred within a three mile radius of a school and/or housing project. *Tucker v. State*, 833 So.2d 668 (Ala.Crim.App. 2001)

Enhancements Based on Prior Convictions Not Affected

In Apprendi v. New Jersey, 530 US 466 (2000), the United State Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The *Apprendi* Court specifically excluded from its holding proof of prior convictions necessary to invoke the habitual felony offender act.

The defendant in this case successfully argued that the enhancement of his sentence of distributing a controlled substance by 10 years pursuant to the 3-mile radius statutes (13A-12-250 and 270) should have been submitted to the jury and proven beyond a reasonable. The court declined to adopt the position that a fact elevating a sentence above the statutory maximum must be alleged in the indictment. *Poole v. State* 846 So.2d 370 (Ala.Crim.App. 2001)

Apprendi Decision Not Retroactively Applied

Calloway was convicted as a habitual felony offender for unlawful distribution of a controlled substance and given a 20 year base sentence that was split by the trial court followed by 5 years on probation, with an additional 10 year imprisonment based on the enhancement provisions of §13A-12-250 and 270. The Court of Criminal Appeals held that (1) the trial court erred in splitting the defendant's sentence since the minimum he could receive was 30 years imprisonment; (2) the sentence enhancements for unlawful sale of a controlled substance within a 3 mile radius of a school or housing project did not have to be charged in the indictment and (3) *Apprend*i does not apply retroactively to cases on collateral review, citing *Sanders v. State*, 815 So.2d 590 (Ala.Crim.App. 2001). *Calloway v. State*, 860 So.2d 900 (Ala.Crim. App. 2002).

PRESENTENCE REPORTS

Comments in PSI Report Did Not Deny Defendant Fair Sentence

Noting that the findings of the trial court were clearly based on evidence presented during the trial and that they did not contain any inaccuracies, the Court of Criminal Appeals rejected the defendant's claim that he was denied a fair sentence because of alleged inaccurate comments made in the pre-sentence report. The Court noted, "Whatever the propriety of the comments in a pre-sentence report, it would be a rare case indeed where a probation officer's rhetoric could overwhelm the independent judgment of a sentencing court."

Calhoun v. State, 2005 WL 995489 (Ala.Crim.App. 2005).

POSTCONVICTION REVIEW – RULE 32 PETITIONS

Rule 32.2(b) A.R.Crim.P. – Successive Petitions for Post-Conviction Review

Pursuant to Rule 32.2(b) New claims in subsequent petitions are barred as being successive unless the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard and failure to entertain the petition will result in a miscarriage of justice. This opinion overruled *Blount v. State*, 572 So.2d 498, to the extent that it held that a subsequent petition on different grounds was not successive unless a prior petition was decided on its merits.

Note: Rule 32.2 (a)(4) was amended by the Supreme Court by Orders dated March 22, 2002 and July 1, 2002, to expressly incorporate this holding into the rule. Other amendments were made to the rule, specifically, Rule 32.2(c) was amended to provide for a 1 year statute of limitation (previously 2 years) and subsection (d) was added to provided that claims of ineffective assistance of counsel could not be raised in a successive petition but must be raised as soon as practicable, either at trial, on direct appeal or in the first Rule 32 petition. These amendments become effective August 1, 2002, for all defendants except those in which a certificate of judgment was issued by the Court of Criminal Appeals between August 1, 2001 and August 1, 2002, in which event those defendant have until August 2003 to file a Rule 32 petition. *Whitt v. State*, 827 So.2d 869 (Ala.Crim.App. 2001)

Post-Conviction Remedy - Rule 32 ARCrP – Procedural Bar of Constitutional Claims

The defendant filed a Rule 32 petition challenging his sentence to life imprisonment without possibility imposed pursuant to the Habitual Felony Offender Act. The defendant stole a bicycle from a screened porch while the owner was home and was charged with first-degree burglary, a Class A felony. He was sentenced as a habitual offender based on five prior convictions: one for first-degree receiving stolen property and four for burglary in the third degree, none of which was a Class A felony. The Alabama Supreme Court affirmed the judgments of the trial court and Court of Criminal Appeals denying post-conviction relief, holding that the petitioner's claim that his sentence was excessive and disproportionate to the crime for which he was convicted was a constitutional claim, rather than a jurisdictional claim, and was thus procedurally barred under Rule 32. Although the Court noted that the application of the habitual felony offender act in this case "has produced what many might consider a harsh result," it stated that this issue was one that was more appropriately addressed by the Legislature. *Ex parte Sanders*, 792 So.2d 1087 (Ala. 2001).

Verification Not Jurisdictional Defect

The failure to comply with the verification requirements of Rule is not a defect that operates to deprive the circuit court of subject-matter jurisdiction to consider the merits of a Rule 32 petition; therefore, the defect is waived if not presented to the court. *Smith v. State*, 2005 WL 435118 (Ala.Crim.App. 2/25/05); *Brooks v. State*, 2005 WL 995416 (Ala.Crim.App. 4/29/05).

PROBATION - PROBATION REVOCATION

Formal Discharge of Probation

Probation may be continued until its conditions are fulfilled and the court issues a formal discharge. The probationary period may be tolled and its term extended by the court, provided that the probation period does not exceed the statutory maximum. Rule 27.3(a) Ala.R.Crim.P. Revocation proceedings must begin within the maximum period permitted by law.
G.L.C. v. State, 910 So.2d 163 (Ala.Crim.App. 2005).

Written Order Mandatory Prerequisite to Revocation

Rule 27.6(e) of the Alabama Rules of Criminal Procedure requires that all conditions of probation be incorporated into a court's written order and that a copy of the order be given to the probationer. This requirement is mandatory and probation cannot be revoked for violations if the probationer did not receive a written copy of the conditions or regulations of probation. Rule 27.6(e) is specific in requiring that the conditions be reduced to writing and provided to the defendant; oral instructions are insufficient to fulfill these requirements. *D.D. v. State*, 855 So.2d 1135 (Ala.Crim.App. 2003); Owens v. State, 887 So.2d 1015 (Ala.Crim. 2004).

In this case the defendant was convicted of first degree burglary and first degree theft and originally sentenced to 20 years imprisonment for each, with the sentences to run concurrently. The sentences were then suspended; a five-year "reverse-split" sentence was imposed for each conviction, with suspension conditioned on the defendant successfully completing boot camp and two years of supervised probation. Five months later the trial court granted the defendant's application for youthful-offender status and released him on supervised probation, however, the judge failed to resentence him according to the provisions of the Youthful Offender Act (§ 15-19-6), which limits incarceration to a maximum of three years. When the defendant subsequently violated conditions of his probation, the trial court revoked his probation and reinstated his original 5-year prison sentence. The Court of Criminal Appeals reversed, holding that because the original sentence had been voided by the subsequent grant of youthful-offender status and the trial court failed to resentence the defendant as a youthful

offender, every proceeding the court took, including its attempt to revoke probation was void. *Warwick v. State*, 843 So.2d 832 (Ala.Crim.App. 2002).

Probation Revocation – Sentence

It is within the sound discretion of the trial judge whether to impose the original sentence or some other disposition as a sanction for a probation violation. *Holden v. State*, 820 So.2d 158 (Ala.Crim.App. 2001); See Rule 27.6(d) Rules of Criminal Procedure.

No Credit for Time Served on Probation

A defendant whose probation is revoked is not entitled to credit on his sentence for the time served on probation. *Johnson v. State*, 778 So.2d 252 (Ala.Crim.App. 2000)

Initiation of Revocation Proceeding

State may initiate proceeding to revoke probation, even when the proceedings were not initiated until after the date probation was originally scheduled to end since probationer had not satisfactorily fulfilled the conditions of his probation or received a formal discharge from the trial court. *Sherer v. State*, 486 So.2d 1330 (Ala.Crim.App. 1986).

Increasing Split Sentence Upon Revocation

A split sentence may be imposed upon revocation of probation, provided that the time to serve does not exceed the maximum allowed (3 years or 5 years). *Phillips v. State*, 755 So.2d 63 (Ala.Crim.App. 1999); See also, *Havis v. State*, 710 So.2d 527, 528-29 (Ala.Crim.App. 1997).

On revocation of probation in which the defendant was originally sentenced to 5 years imprisonment, the sentence was suspended and the defendant was placed on probation for 5 years, the trial court had authority to "split" the defendant's original sentence and require him to serve three years in confinement without the benefit of good time or parole. *Parker v. State*, 648 So.2d 653 (Ala.Crim.App. 1994).

RESTITUTION

Interest Authorized

In a case involving the theft of over $200,000 from the City of Decatur by a former employee, the trial court sentenced the defendant to 15 years in the penitentiary, split the sentence and ordered her to serve 48 hours in the county jail, followed by 15 years probation. In addition payment of restitution was ordered in the amount of $200,000 plus 12% interest amortized over a 15-year period. Addressing a question of first impression, the Alabama Supreme Court held that pursuant to the provisions of the Alabama Restitution to Victims of Crimes Act (codified at §§ 15-18-65 to 78, Ala.Code 1975), a trial court can order a defendant to pay interest on an amount ordered as restitution. Although the Court held that the trial court correctly imposed the statutory 12 percent rate of interest, because the monthly restitution payments ordered were obviously beyond the defendant's financial means, the case was remanded for the court to consider the defendant's ability to pay. *Ex parte Fletcher,* 849 So.2d 900 (Ala. 2001).

RIGHT TO COUNSEL

Misdemeanant's Right to Appointed Counsel – Test is If Imprisonment Given Now or Later as a Result of Probation Revocation

This case involved a defendant, without council, was convicted of misdemeanor assault and sentenced to 30 days in jail which the trial court suspended and placed the defendant on 2 years unsupervised probation. The United States Supreme Court held that the 6th Amendment does not permit activation of a defendant's sentence upon an indigent defendant's violation of the terms of his probation when the State did not provide him with counsel during the prosecution of the offense for which he is imprisoned.

Rejecting the State's argument that counsel should only be required, if at all, at the probation revocation stage, the Court noted that "[i]n Alabama the probation revocation hearing is an informal proceeding, at which the defendant has no right to counsel, and the court has no obligation to observe customary rules of evidence. More significant, the defendant may not challenge the validity or reliability of the underlying conviction." The argument advanced by amicus brief that Alabama (and other states) could not afford the costs resulting from the court's ruling, the Court seemed to support the expanded use of prosecutor's pre-trial diversion programs in stating, "those jurisdictions have recourse to the option of pretrial probation, whereby the prosecutor and defendant agree to the defendant's participation in a pretrial rehabilitation program which includes conditions typical of post-trial probation, and the adjudication of guilt and imposition of sentence for the underlying offense occur only if the defendant breaches those conditions. This system reserves the appointed counsel requirement for the few cases in which

incarceration proves necessary…while respecting the constitutional imperative that no person be imprisoned unless he was represented by counsel." (citations omitted).

> *See United States v. Perez-Marcias*, 327 F.3d 384 (5th Cir. 4/2/03), in which the Fifth Circuit Court of Appeals affirmed the District Court's holding that a prior misdemeanor conviction in which the defendant was not provided council but received probation could be used to enhance his current offense to a felony. Distinguishing the facts of this case from those in *Alabama v. Shelton*, the court noted that Shelton involved a defendant who received a suspended sentence and, was thus, given a term of imprisonment, while this case involved a defendant who received a "stand-alone" sentence of probation.

Alabama v. Shelton, 122 S.Ct. 1764 (S.Ct.2002)

SEX OFFENSES

Juvenile Sex Offenders – Assessment Mandatory Prior to Release

A trial judge has no authority to release juvenile sex offenders from probation until he undergoes a sexual offender assessment as mandated by § 15-20-28.

In *D.B.Y. v. State*, 910 So.2d 820(Ala.Crim.App. 2005), the Alabama Court of Criminal Appeals held that a trial judge could not release a juvenile sex offender granted YO status from probation until he underwent a sexual-offender risk assessment. Citing § 15-20-20.1 and 15-20-28, the Court opined that a sexual offender risk assessment is mandatory and a juvenile sex offender cannot be removed from supervision of the court until the treatment provider has filed a risk assessment with the court.
Ex parte State (In Re D.B.Y. v. State), 910 So.2d 820 (Ala.Crim.App. 2005).

Mens Rea – Allowing Display of Genitals

Because § 13A-12-200.11 which provides for the offense of allowing the display of genitals, etc., for entertainment purposes does not exclude any of the culpable mental states, it may be committed intentionally, knowingly, recklessly, or as the result of criminal negligence. The applicable mental state will depend on the facts of each case. Statute not unconstitutional on vagueness grounds. *Scott v. State*, (Ala.Crim.App. 2005)

Display of Genitals Separate Acts

Each time a "peep show" is performed in violation of § 13A-12-200.11, it is a separate criminal act. . *Scott v. State*, (Ala.Crim.App. 2005)

SPECIFIC CRIMES

Concurrent Sentences Only Authorized for Convictions of Burglary and Theft Arising out of Same Transaction

Although a defendant can be convicted of both burglary and theft where the crimes arose from the same transaction, the defendant may only receive one punishment. *Ex parte McKelvey*, 630 So.2d 56 (Ala. 1992). *See also, Brown v. State*, 821 So.2d 219,225 (Ala.Crim.App. 2000), in which the Court of Criminal Appeals held that a defendant convicted for burglary and theft arising from the same transaction could be sentenced for both if the sentences are made concurrent, rather than consecutive.

The McKelvey opinion has been restricted as applying only to "kindred crimes," which trial courts must determine from analyzing the statutes involved. *Ex parte Dixon*, 804 So.2d 1075, 1080 (Ala. 2000). The Court of Criminal Appeals has held that *McKelvey* is inapplicable to cases involving robbery and burglary, rape and burglary, or sodomy and burglary. *Dawson v. State*, 675 So.2d 897, 902(Ala.Crim.App. 1995).

BUI -Traffic Offense Which Must be Charged by UTTC

Boating under the influence of alcohol is a misdemeanor traffic offense and in order for the court to acquire subject matter jurisdiction, the State must commence the prosecution by filing a valid UTTC.
Stoll v. State, 724 So.2d 90 (Ala.Crim.App. 1998; *See also*, AG Opinion 2005-113, 2005 WL 1121890 (April 18, 2005).

Intent Essential Element of Receiving Stolen Property 1st Degree

Holding the indictment charging the defendant with Receiving stolen property in the first degree was void and that the inmates Rule 32 petition was not subject to the statute of limitations period, the Court of Criminal appeals held that the element of intent was an essential element of the offense of first degree Receiving Stolen property and could not be waived.
Johnson v. State, CR-04

SPECIFIC PENALTY PROVISIONS

Escape – Misdemeanor or Felony?

Only those state inmates that are transferred from state custody to county custody with the approval of DOC can be charged with the misdemeanor offense escape (§14-8-42) if they escape from work release while in county custody. Inmates in county custody awaiting transfer to DOC who escape or fail to return from work release will be subject to felony escape penalties pursuant to 13A-10-33. *Conner v. State,* 840 So.2d 950 (Ala. 2002)

Section 15-22-27.1 Denying Parole To Repeat Serious Offender Not Implicitly Repealed By HFOA

Section 15-22-27.1 which provides that "[a]ny person convicted of any act, or attempt to commit the act of murder, rape, robbery or assault with a deadly weapon, the commission of which directly and proximately resulted in serious physical injury to another and the commission of which follows within five years a previous conviction of another felony, or attempt thereof, resulting in serious physical injury to another, shall upon conviction serve such sentence as may be imposed without the benefit of parole, notwithstanding any law to the contrary," was not implicitly repealed when the Legislature enacted the Habitual Felony Offender Act. *Moore v. State,* 739 So.2d 536 (Ala.Crim.App. 1998), overruling *Goldsmith v. Alabama Board of Pardons and Paroles*, 724 So.2d 80 Ala.Crim.App. 1998).

Habitual Felony Offender Act

Not Applicable to Child Abuse
The Habitual Felony Offender Act cannot be applied to enhance a conviction for child abuse under § 26-15-3. *Kennedy v. State*, 2005 WL 995448 (Ala.Crim.App. 2005).

Court Exceeded Jurisdiction in Splitting Aggregate Sentence Exceeding 20 Years
A court must consider enhancements pursuant to § 13A-12-250 and 13A-12-270, Ala.Code, 1975, as part of a single aggregate sentence for an offense. A circuit court does not have jurisdiction to split a 25 year sentence.
Draper v. State, 2005 WL 628220 (Ala.Crim.App. 2005).

Pardon Convictions Cannot Be Used as Enhancements
Reversing the Court of Criminal Appeals holding that six prior felony convictions for which the petitioner had received a full and unconditional pardon could be considered to enhance his subsequent conviction for robbery pursuant to the Habitual Felony Offender

Act, the Alabama Supreme Court held that ***pardoned convictions cannot be used to enhance a sentence under the Habitual Felony Offender Act***. *Ex Parte Casey*, 852 So.2d 175 (Ala. 2002)

Prospective Application of the Amendments to the HFOA (Prior to Retroactive Amendment**)**

Defendant sought post conviction relief following amendment of the HFOA, alleging his life without parole sentence under the Act violated equal protection. The Supreme Court held that the defendant's right to equal protection was not violated by prospective application of the Act. Noting that the Legislature properly may give only prospective operation to statutes that lessen the punishment for a particular offense to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment, the Court held that a reduction of sentences only prospectively from the date a new sentencing statute takes effect was not a denial of equal protection. *Ex parte Zimmerman*, 838 So.2d 408 (Ala. 2002)

New Statute Authorizes Reconsideration of Certain HFO Sentences

In *Ex parte State of Alabama (In re Junior Mack Kirby),* the Alabama Supreme Court held that in passing Act 2001-977, the Legislature gave retroactive application of § 13A-5-9, vesting jurisdiction in the sentencing judge or the presiding judge to reopen a case more than 30 days after sentencing. The Court noted that retroactive application of the HFOA amendment is only applicable to a narrowly defined group of inmates. Those inmates are those who fit the following criteria:

(1) Those who were sentenced under the Habitual Offender Act,
(2) prior to May 26, 2000,
(3) who are currently serving either a sentence of "life without the possibility of parole" and none of the prior convictions used for enhancement purposes were Class A felonies or who are serving a sentence of "life" for a Class B Felony, and
(4) who are determined, *by the sentencing or presiding judge* to be a non-violent offender.

Kirby v. State, 899 So.2d 968 (Ala. 2004), rehearing denied.

Kirby Motions for Modification -Limited Appellate Review

Although orders entered on §13A-5.9.1 are appealable, appellate review of such orders is limited. If a court chooses to resentence a petitioner, imposing a sentence that is authorized, the appellate courts will not second guess that court's discretionary decision.

No Filing Fee or Indigency Determination Required

> "Because a §13A-5-9.1 motion involves reopening an existing case, a circuit court is not required to grant a petitioner indigent status or to require a petitioner to pay a filing fee before it can obtain jurisdiction over the case."
>
> …
>
> "[A] § 13A-5-9.1 motion involves reopening an existing case in which there has been a conviction and sentence, for possible re-sentencing. Logically, then, any order either granting or denying a request for reconsideration of a sentence would be appealable.

> "[T]he only inmates who would be eligible for reconsideration of their sentence(s), in the discretion of the circuit court, are (1) nonviolent offenders with three prior felony convictions who were subsequently convicted of a Class B felony and sentence to life in prison pursuant to § 13A-5-9(c)((2), Ala.Code, 1975, and (2) nonviolent offenders with three prior felony convictions, none of which was a Class A felony, who were subsequently convicted of a Class A felony and sentenced to life without the possibility of parole pursuant to § 13A-5-9(c)(3), Ala.Code, 1975."

Prestwood v. State, 915 So.2d 580 (Ala.Crim. App. 2005)

Evaluation of Kirby Motions -Three Step Process

Sentencing Courts were advised to conduct a three-step process when evaluating motions filed under §13A-5-9.1:

1) Determine if the motion was filed in the appropriate court and whether it has been assigned to the appropriate judge (sentencing judge or presiding judge), *Ex parte Sandifer*, 2005 WL 3507967 (Ala.Crim.App. 2005);
2) Whether the motion is the inmates first motion or successive motion, since no jurisdiction to grant second or successive §13A-5-191 motions, *Wells v. State*, 2005 WL 2810756 (Ala.Crim.App. 2005);
3) Whether the inmate is eligible for reconsideration –
    a. Must have been sentenced before 5/25/2000 under the habitual felony offender Act;
    b. As a felony offender with three prior convictions (none of which was a Class A felony) to life imprisonment without parole pursuant to § 13A5-9(c)(3)

    or

    life imprisonment pursuant to §13A-5-9 (c)(2).

    c. If the inmate is a nonviolent offender.

Holt v. State, 2005 WL 3507967 (Ala.Crim.App. 2005).

Evidentiary Hearing Not Required for Kirby Motion

In *Holt v. State,* the Court of Criminal Appeals held that a circuit court was not required to hold an evidentiary hearing or solicit additional information before ruling on a §13A-5-9.1 motion and that Kirby motions could be summarily denied.
Holt v. State, 2005 WL 3507967 (Ala.Crim.App. 2005).

No Right To Counsel

A motion filed pursuant to § 13A-5-9.1 is not considered 'a critical stage of the proceeding' that requires the appointment of counsel. *Holt v. State*, 2005 WL 350796 Ala.Crim.App. 12/23/2005); *Hastings v. State*, 2005 WL 3507994 (Ala.Crim.App. 12/23/2005)..

Kirby Eligible Offenders Must be Non-Violent

Although §13A-5-9.1 grants the sentencing judge or presiding judge jurisdiction to consider a § 13A-5-9.1 motion, by its very language, §13A-5-9.1 grants the sentencing judge or presiding judge jurisdiction to resentence only those offenders that are eligible for resentencing, i.e., nonviolent offenders who were sentenced pursuant to § 13A-5-9(c)(2) or (c)(3). In this case, the defendant was convicted of Robbery in the first degree, where one of the elements is being armed with a deadly weapon. The Court of Criminal Appeals held that he was a violent offender and thus, not eligible for a reduced sentence under *Kirby*.

Sanders v. State, 2005 WL 2046420 (Ala.Crim.App. 2005).

Trial Judge Must Make Non-Violent Determination Based on Totality of Information

Elaborating on its holding in *Sanders v. State*, 2005 WL 2046420 (Ala.Crim.App. 2005), the Court of Criminal Appeals held that whether an inmate was a "nonviolent convicted offender" who would be eligible to have his sentence modified through a *Kirby* motion, must be based on the totality of the circumstances that the court has before it when ruling on the motion to reconsider his sentence. The Court emphasized that the fact that a crime is statutorily defined as a "violent offense," is not binding on a circuit court's determination, "although it is a relevant and appropriate consideration."

Holt v. State, 20050 WL 3507967 (Ala.Crim.App. 2005).

Class B Felony Offenders Under Kirby

Persons sentenced to life imprisonment under the Habitual Felony Offender statute who have been convicted of a Class B felony and have at least 3 prior felony convictions are eligible to file a motion for reconsideration of their sentence under § 13A-5-9.1.

Mack v. State, 2005 WL 1492029 (Ala.Crim.App. 6/24/05).

Mislabeling Kirby Motion Not fatal

Substance controls over style, therefore a mislabeled Kirby motion should be considered by the sentencing court.

Mallory v. State, 908 So.2d 1048 (Ala.Crim.App. 2004).

Filing and Judge to Reconsider

Kirby motions must be filed in the court of original conviction and only the "sentencing judge or presiding judge" of that circuit has jurisdiction to review the motion.

Dailey v. Alabama Board of Pardons and Paroles, 908 So.2d 311 (Ala.Crim.App. 2004), Cert denied by Alabama Supreme Court March 11, 2005.

.

Filing Is In Court of Original Conviction By Presiding or Sentencing Judge- Transfer
A motion for reconsideration of a sentence pursuant to retroactive amendment to Habitual Felony Offender Act (HFOA) must be filed in the court of original conviction, and only the sentencing judge or the presiding judge of that circuit has jurisdiction to review the motion; because only the sentencing judge or the presiding judge of the circuit in which the inmate was convicted and sentenced has jurisdiction to reconsider the sentence, a motion filed in the wrong circuit court should be transferred to the court of original conviction for appropriate disposition.
Burns v. State, 908 So.2d 1045 (Ala**.**Crim.App.,2004).

Successive Kirby Motions Prohibited
"[O]nce a circuit court has considered one motion for reconsideration of sentence filed by a defendant in a particular case, the defendant's rights with regard to that case will have been sufficiently safeguarded. Thereafter, the circuit court will not have jurisdiction to consider any second or successive motions for reconsideration filed by that defendant in that particular case. Instead, it should summarily deny any such motion."
Wells v. State, 2005 WL 2810756 (Ala.Crim.App. Oct. 28, 2005); *Holt v. State*, 2005 WL 3507967 (Ala.Crim.App. 2005).

Only Prior Convictions Apply
Convictions occurring after commission of the offense for which the defendant is being sentenced cannot be used to enhance punishment under the Habitual Felony Offender Act. *Ex parte Peterson*, 466 So.2d 984, 986 (Ala.1984); *Hamilton v. State*, 635 So.2d 911 (Ala.Crim.App. 1993); *Bridges v. State*, 563 So.2d 13 (Ala.Crim.App. 1989).

Notice to Defendant
Sentencing a defendant within 15 minutes of his receiving notice of the state's intent to proceed under the provisions of the Habitual Felony Offender Act is unreasonable.
Ex parte Crews, 797 So.2d 1119 (Ala. 2000).

Split Sentencing Statute

Mandatory Minimums Can be Suspended After Statute Amended to Apply to Sentences of 20 years or Less

The amendment to Alabama's split sentencing statute (effective 5/25/01) supersedes the prohibitions against probation of the 5 year mandatory enhancement provisions in § 13A-12-250 and § 13-12-270 for the sale of drugs within 3 miles of a school or housing project and allows a trial court to suspend sentences of 20 years or less. *See also Tucker v. State*, 933 So.2d 668 (Ala.Crim.App. 2001).

In *Soles*, the Court of Criminal Appeals held that Alabama's split sentencing statute (§ 15-18-8), as last amended, allows a trial court to suspend a sentence imposed upon application of the five year enhancement statutes for person's convicted of the unlawful

sale of a controlled substance within three miles of a school or public housing project. Although the *Soles* case only involved enhancements pursuant to the 3-mile radius statutes, applying the same rationale to other enhancement statutes (firearm enhancement, domestic violence, hate crimes, DUI, enticing a child to enter a vehicle, house, etc., and drug trafficking), would apparently lead to the same conclusion because the amendment of the split sentencing statute was the latest expression of the Legislature on the subject. *Soles v. Alabama*, 820 So.2d 163 (Ala.Crim.App. 2001)

Application Discretionary

Although *Soles* held that § 15-18-8(a)(1), as amended, *allows* a trial court to suspend a sentence imposed pursuant to § 13A-12-250 or 13A-12-270, neither Soles nor amended § 15-18-8 requires a trial court to do so. *Moore v. State*, 871 SO.2D 106 (Ala.Crim. App. 4/25/03)

Conner was convicted of the unlawful sale of a controlled substance and sentenced as a habitual felony offender to 20 years imprisonment that was split with 3 years to serve. The trial judge enhanced the sentence pursuant to § 13A-12-250 and 13A-12-270 because the sale occurred within 3 miles of a school and housing project, with two 5-year sentences to running consecutively with the 20-year sentence and with each other. In an opinion issued March 1, 2002 (now withdrawn), the Court of Criminal Appeals erroneously remanded the case to the trial court for resentencing to allow the trial court the opportunity to split or suspend the enhancements utilizing its discretion as noted in *Soles*. On remand the Court recognized that the defendant's original sentence was erroneous because the minimum sentence he could receive was 30 years imprisonment that could not be split. The Court noted that it had "consistently treated sentences imposed pursuant to §13A-12-250 and §13A-12-270 as enhancements to a base sentence and, thus, as part of a single aggregate sentence for an offense. *State v. Corley*," 831 So.2d 59 (Ala.Crim.App.2001), [rehearing denied 1/25/02, certiorari denied 5/22/02]. The split sentencing statute could not apply since the minimum sentence exceeded 20 years imprisonment.

As a separate issue the Court rejected the defendant's contention that the Court erred in amending the indictment to charge the enhancements. Citing *Poole v. State,* 2001 WL 996300 (Ala.Crim.App. 2001), *infra*, and Apprendi, *supra,* the Court noted that "the location of the crime is relevant only to the sentence the defendant may receive and not to whether, in fact, the defendant committed the offense distributing a controlled substance as charged in the indictment. In *Poole*, the Court held it is not necessary to include enhancements under § 13A-12-250 and 13A-12-270 in the indictment, therefore, amending the indictment to include these enhancements was held to amount to mere surplusage**.** *Conner v. State,* 899 So.2d 295 (Ala. Crim. App. 6/28/2002), On Return to Remand.

Court Exceeded Jurisdiction in Splitting Aggregate Sentence Exceeding 20 Years

A court must consider enhancements pursuant to § 13A-12-250 and 13A-12-270, Ala.Code, 1975, as part of a single aggregate sentence for an offense. A circuit court does not have jurisdiction to split a 25 year sentence.
Draper v. State, 2005 WL 628220 (Ala.Crim.App. 2005).

Split Sentence After Revocation of Probation Portion of Original Split Authorized
A trial court has authority to split sentences upon revocation of probation by adding another period of confinement and suspending remaining portion, overruling *Hollis v. State, 845 So.2d 5 (Ala.Crim. App. 2002. In Dixon v. State, 912 So.2d 292(Ala.Crim.App. 1/28 05)* the Court of Criminal Appeals held:

> "§15-18-8(c), Ala.Code 1975, … merely authorizes a circuit court to suspend any portion of the period of confinement, to modify the conditions of probation, and to revoke probation even if the defendant had not begun serving his period of confinement or if the defendant is currently serving his period of confinement. Section 15-18-8(c), Ala.Code 1975, does not address the alternatives available to a circuit court when it finds that a defendant has violated the terms and conditions of his probation and does not address the circuit court's jurisdiction over a defendant who has served the period of confinement. Rather,,… §15-22-54(d), Ala.Code 1975, provides for the initiation of revocation proceedings against a defendant who is on probation and sets forth the alternatives available to a circuit court when it finds that a defendant has violated the terms and conditions of his probation."
>
> . . .
>
> "[I]n Hollis, this court held that when a circuit court finds that a defendant has violated the terms and conditions of his probation, that court may only reinstate the suspended portion of the original term of confinement. However, this holding ignores the remaining language of § 15-22-54(d), Ala.Code 1975, which provides, in pertinent part:
>
> "(1) If the defendant violates a condition of probation or suspension of execution of sentence, the court, after a hearing, may implement one or more of the following options:
> a. Continue the existing probation or suspension of execution of sentence.
> b. Issue a formal or informal warning to the probationer that further violations may result in revocation of probation or suspension of execution of sentence.
> c. Conduct a formal or informal conference with the probationer to reemphasize the necessity of compliance with the conditions of probation.
> d. Modify the conditions of probation or suspension of execution of sentence, which conditions *may include the addition of short periods of confinement.*
> e. Revoke the probation or suspension of execution of sentence..
>
> "2. If the court revokes probation,, it may, after a hearing, impose the sentence that was suspended at the original hearing or any lesser sentence, including any option listed in subdivision (1)' (Emphasis added)"
>
> …

> A reading of. ..§15-22-54 , makes it clear that the trial court did have the authority to 'split' the appellant's original sentence on revocation of probation… Construed in the context, the sentence '[t]he total time spent in confinement may not exceed the term of confinement of the original sentence,' clearly refers to the total time a defendant has spent in confinement ---whether it be in full-time confinement in facilities such as county jail, state prison, and boot camp, or any 'partial'confinement such as work release programs, intermittent confinement, and home detention…. And that such total time of confinement may not exceed the term of the defendant's original sentence. In other words, the length of a defendant's sentence … may not be increased after his probation is revoked."

Dixon v. State, 912 So.2d 292(Ala.Crim.App. 1/28/05)

3 Year Mandatory Minimum Imprisonment Can Be Suspended

While the split sentencing statute requires that a defendant's sentence to greater than 15 years but not more than 20 years include a minimum term of imprisonment of no less than 3 years nor more than 5 years, a sentencing court can suspend the 3 year mandatory minimum term of confinement under § 15-18-8(a)(1). Subsection (c) of the split sentencing statute expressly authorizes a trial court to suspend the minimum sentence required under subsection (a, including the minimum period of confinement for sentences greater than 15 years but not more than 20 years. The court may suspend the entire sentence.

Ex parte McCormick, 2005 WL 3120222 (Ala. 2005 11/23/05).

Probation Must Follow Confinement – Manner In Which Sentence Executed Invalid

In this case the Rule 32 petitioner was challenging the trial court's jurisdiction in sentencing him to 15 years imprisonment, split to serve six months in confinement. The record in the case failed to indicate whether the sentence included a probationary term to follow the six-month term of confinement. Citing the split sentence, the Court of Criminal Appeals held that "[t]he plain language of the statute indicates that a trial court can split a sentence only if the defendant is placed on probation for a definite period following the confinement portion of the split sentence." Remanding the case to the trial court for clarification, the Court held that if the original sentence did not include a probationary term to follow the confinement portion of the sentence, execution of the sentence was invalid under § 15-18-8, the split sentence statute. *Madden v. State*, 864 So.2d 395 (Ala.Crim.App. 2002). See also, *Moore v. State*, 2003 WL 1950015 (Ala.Crim.App. 2003), recognizing that § 15-18-8 requires suspension of that portion of the split that is not actual confinement and placement of the defendant on probation. Citing *Madden* and other cases, the Court reiterated that the trial court's power to suspend, which derives from Amendment 38 of the Alabama Constitution, can only be exercised when coupled with an order of probation.

Probation is essential part of Split Sentence

In *Hemrick v. State,* 2005 WL 1492026 (Ala.Crim.App.6/24/05), the Alabama Court of Criminal Appeals held:

"The plain language of § 15-18-8, Ala. Code 1975,] indicates that a trial court can split a sentence only if the defendant is placed on probation for a definite period following the confinement portion of the split sentence. Indeed, this Court has recognized that

'[a]pplication of § 15-18-8 necessitates suspension of that portion of the split sentence that is not actual confinement and placement of the convicted defendant on probation. …' *Hughes v. State*, 518 So.2d 890, 891 (Ala.Crim.App. 1987). In addition, 'in view of the history and text of Amendment 38 [of the Alabama Constitution of 1901, from which a trial court's power to suspend a sentence stems,] the power to suspend a sentence … can only be exercised when coupled with an order for probation.' Holman v. State, 43 Ala.App. 509, 513, 193 So.2d 770, 773.(1966) (emphasis added." Madden v. State, 864 So.2d 395, 398 (Ala.Crim.App. 2002."
Hemrick v. State, 2005 WL 1492026 (Ala.Crim.App.6/24/05); *Hughes v. State*, 518 So.2d 890 (Ala.Crim.App. 1987).

Appeal – Split Sentence

An order dismissing a defendant from "boot camp" and ordering him to serve his period of confinement in prison is a modification of the defendant's place of confinement rather than probation revocation, and is therefore, not an appealable order. *Romanick v State*, 816 So. 2d 1081 (Ala.Crim.App. 2001).

Modifying Consecutive Sentences To Concurrent

Rule 26.12 Alabama Rules of Criminal Procedure does not authorized the trial court to amend a sentence order to change a concurrent sentence to a consecutive sentence."

Revocation of Probation on Split – Total Period of Confinement

Upon revocation of probation of a split sentence, a trial court may impose additional periods of confinement on a defendant so long as the total period of confinement does not exceed the maximum (3 or 5 years) provided in the split sentencing statute.
Phillips v. State, 2005 WL 628494 (Ala.Crim.App. 3/18/2005).

Three Mile Radius Enhancements

Need Not Be Alleged in Indictment

The Supreme Court's decision in *Apprendi* [*v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (S.Ct. 2000)] does not require that Alabama's 5-year sentence enhancements for selling drugs within a three-mile radius of a school or housing project enhancements (§§ 13A-12-250 and 13A-12-270) be alleged in the indictment. *Austin v. State*, 864 So.2d 1115 (Ala.Crim.App. 2003).

Applicable to Conspiracies and Attempts

Sections 13A-12-250 and 13A-12-270 are applicable to convictions for the conspiracy to *sell* a controlled substance and the attempt to sell a controlled substance. *Skinner v. State,* 843 So.2d 820 (Ala.Crim.App. 2002).

Not Applicable to Distribution

The three-mile enhancement provisions of §§ 13A-12-250 and –270, prescribe a five-year sentence enhancement for persons convicted of an unlawful sale of a controlled substance within three miles of a school and within three miles of a housing project. These statutes apply only to convictions involving sales and *not* to convictions involving furnishing, giving away, manufacturing, delivering or distributing a controlled substance in violation of § 13A-12-211. The enhancements would not apply to convictions for conspiracy or attempt where the underlying controlled substance is not a sale. Skinner v. State, 843 So.2d 820 (Ala.Crm.App. 2002). See Williams v. State, (overruled on other grounds). 706 So.2d 82 (Ala.Crim.App. 1997), holding that unless the defendant sold or is found to have collaborated or associated with the seller to sell a controlled substance, the enhancements do not apply

Guilty Plea – Notice of Enhancements

Unless a defendant is advised by the trial court or counsel that the enhancement provisions of §§ 13A-12-250 and 13A-12-270 would be applied to his sentence and that he could not receive probation, he has not been informed of the true and correct terms of the sentence and his guilty plea cannot be said to be knowingly given. *Smith v. State,* 852 So.2d 185 (Ala.Crim.App. 2002); *Ragland v. State*, 883 So.2d 730 (Ala.Crim.App. 2003).

Firearm Enhancement Statute

Whether the defendant possessed the requisite culpability for the firearm enhancement statute to apply must be determined on a case-by-case basis.
Woods v. State, 602 So.2d 1210, 1211 (Ala.Crim.App. 1992).

The firearm sentence enhancement provision of 13A-5-6 (5), *Code of Alabama* 1975, can apply, under the facts of the case to a reckless manslaughter conviction. *Mays v. State*, 607 so.2d 347 (Ala.Crim.App. 1992).

The firearm enhancement statute can be applied to enhance a sentence for conspiring to distribute a controlled substance and can be applied to a coconspirator where one defendant possesses a firearm during the conspiracy. (overruled on other grounds). *v. State*, 728 So.2d 1108 (Ala.1997), on remand, 728 So.2d 1113 (Ala.Crim.App.1998)

FELONY DUI/TRAFFIC

Jurisdiction

Felony DUI only charged in Indictment – Failure of Proof
This case involved a defendant charged with DUI at the time there was a 5 year limitation on the use of prior DUI convictions to enhance to a felony offense. Although the defendant had 4 prior DUI convictions, by the time he was indicted, only 2 priors were within the preceding 5-year period. The Court of Criminal Appeals held that since the indictment only charged a misdemeanor DUI, the Circuit Court had no jurisdiction and the municipal Court of Decatur had exclusive original jurisdiction.

Noting that jeopardy had not attached because the circuit court never acquired jurisdiction, the Court remanded the case to the circuit court with instructions to dismiss the indictment as fatally defective and to notify the Decatur Municipal Court that it should resume jurisdiction, i.e. revive the original traffic case based on the DUI ticket. The Court noted that there was no statute of limitations issue because the UTC tolls the limitations period for purposes of commencement of the prosecution of misdemeanors, citing Hastings v. State, 589 So.2d 795(Ala.Crim.App. 1991).
Dutton v. State, 807 So.2d 596 (Ala.Crim.App. 2001).

District Court has exclusive jurisdiction over misdemeanor DUI (traffic) even when an indictment has been returned.
Wright v. State, 494 So.2d 117, 179 (Ala.Crim.App. 1986).

Felony DUI and Misdemeanor DUI Charged in Indictment
When the Grand Jury returns an indictment charging the defendant with felony DUI and misdemeanor DUI, the jurisdiction of the circuit court is invoked and a subsequent dismissal of the felony DUI charge does not divest the circuit court of its jurisdiction over the misdemeanor charges, i.e., if the defendant is willing, the circuit court may accept his guilty plea and impose the appropriate sentence, the circuit court may also dismiss the indictment on the basis that it is fatally defective and, lastly, the circuit court may transfer the case to the district court for disposition of any remaining misdemeanor charges.
Davis v. State, 806 So.2d 404 (Ala.Crim.App. 2001).

Dismissal of a felony DUI charge against a defendant does not strip the circuit court of jurisdiction over the remaining misdemeanor charges. *Casey v. State*, 740 So.2d 1136 (Ala.Crim.App. 1998).

Prosecutions for felony "DUI offenses are to be initiated in the circuit court by the return of an indictment. *Ex parte Formby*, 750 So.2d 587, 590 (Ala. 1999).

Misdemeanor Alleged in Indictment
Indictment charging only misdemeanor DUI was struck down in *Hamilton v. State*, 828 So. 2d 957 (Ala.Crim. 2002), with the Court of Criminal Appeals holding that the circuit

court lacked jurisdiction over the defendant and that the defendant could not consent to amendment to charge felony DUI.
Hamilton v. State, 828 So. 2d 957 (Ala.Crim. 2002); *Blevins v. State*, 747 So.2d 914 (Ala.Crim.App. 1998)..

The indictment must charge felony DUI to put the defendant on notice. "{T}he absence of a reference to § 32-5A-191(h) in an indictment otherwise charging an offense defined in § 32-5A-191(a), Ala.Code 1975, is not a jurisdictional defect, it is a notice defect. Pruitt, 897 So.2d at 408. Lack of notice from the State regarding its intentions to seek application of sentence enhancements is not a jurisdictional defect prohibiting action on the indictment, but rather a constitutional concern the denial of which may not be challenged in the absence of an objection made at trial.
Altheir v. State, 911 So.2d 1105 (Ala.Crim.App. 2004).

Subsection (b) Youth Adjudications Used for Enhancement
Prior convictions under DUI statute applicable to drivers under 21 can be used to enhance sentence. *Casaday v. State*, 828 So.2d 960 (Ala.Crim.App. 2002).

Felony DUI – Can't Use Other State Convictions
Convictions of DUI from other states cannot be used to enhance a defendant's sentence to a felony under Alabama's DUI statute. *Ex parte Bertram*, 2003 WL 857934 (Ala.2003); *Browning v. State*, 901 So.2d 757 (Ala.Crim.App. 2004).

Enhancement for Priors - Within 5 Years Limitation
(now applicable only to 2nd conviction)
The date of conviction, rather than the date of the offense or arrest, controls for enhancement purposes. *State v. Brooks*, 701 So.2d 56, 57 (Ala.Crim.App. 1996); *Dutton v. State,* 807 So.2d 596 (Ala.Crim.App. 2001).

Uncounseled Prior DUI Can Be Used for Enhancement if No Jail Time
To use a prior DUI conviction to enhance a defendant's DUI sentence, the state does not to prove that that defendant was represented by counsel or knowingly and voluntarily waived counsel, if the defendant did not receive jail time in the prior proceeding.
State v. Thrasher, 783 So.2d 103 (Ala. 2000); *Bolan v. State*, 2003 WL 21246581 (Ala.Crim.App. 2003); *Pruitt v. State*, 2003 WL 22026573 (Ala.Crim.App., 2003).

Proof of Prior Convictions – Remand for New Sentence Hearing
The State may prove prior convictions at a second sentencing hearing following remand by an appellate Court.
Altheir v. State, 911 So.2d 1105 (Ala.Crim.App. 2004).

Evidence of Prior DUI Not Admissible
Erroneous admission of defendant's prior DUI conviction for purpose of rebuttal required reversal of defendant's felony DUI conviction.
Upton v. State, 2005 WL 435121 (Ala.Crim.App. 2005)

Driver's License Suspension – Removal Upon Dismissal of Charges
Amendment of § 32-5A-304 (c) providing for removal of notation of driving record where charge is dismissed, nolle prossed or the person is acquitted, applies retroactively.
Alabama Department of Public Safety and Andrews v. *Clark*, 865 So. 2d 1199 (Ala.Civ. App. 2003)

YOUTHFUL OFFENDER ADJUDICATION

"[T]he seriousness of the charge alone is not sufficient basis on which to deny YO status, but the nature of the facts on which the charge rests may alone be sufficient to deny YO status."

In determining whether to grant a defendant youthful offender status, the trial court is expected to consider the nature of the crime charged, along with prior convictions of the defendant and any other matter it deems relevant.
Flowers v. State, 2005 WL 4235113 (Ala.Crim.App. 2005).

X. SENTENCING SNIPPETS

- **There is no Theft 2nd Offense in Alabama**

  Property valued between $1000 and $2500 does not fall within any of the theft of property statutes because of a 2004 amendment which inadvertently reinstituted the pre-2003 values.

  Due to this error, property valued between $250 and $500 now constitutes both second and third-degree theft of property.

  The Sentencing Commission is introducing legislation again in 2006 to correct this problem.

- **Felons Can Be Sentenced Up to Three Years in the County Jail.**
  Section 15-18-1 of the Code provides that for felonies in which imprisonment Is for more than 12 months and not more than three years "the judge may sentence the party to imprisonment in the penitentiary, confinement in the county jail or to hard labor for the county, at his discretion, any other provision of law to the contrary notwithstanding."

  - **And Apparently Up to 5 Years If Under A Split**
    As amended by Act 2000-759 a sentencing judge can split a sentence s greater than 15 years but not more than 20 years and "order the convicted defendant be confined in a prison, ***jail-type institution,*** or treatment institution for a period not exceeding five years, but not less than three years…."

- **The 5 Year Probation Limitation for Felons General Does Not Apply to Splits.**
  In Burge v. State, 623 So.2d 450 (Ala. Crim.App. 1993), reviewing the split sentence statute, the Court of Criminal Appeals opined that the 5-year probation limitation in §15-22-54 did not apply to defendants sentenced under § 15-18-8, the split sentence statute.

- **Utilizing a Split Sentence, 3-mile Radius Enhancements Can Be Suspended.**
  Based on amended language in the split sentencing statute, in *Soles v. State*, 820 So.2d 163 (Ala.Crim.App. 2001), the Court of Criminal Appeals held that trial judges have discretion to suspend sentences imposed pursuant to the statutes providing for 5-year enhancements when drugs are sold near a school or housing project.

- **Split Sentences - Can Be Used Upon Revocation of Probation Portion of Split , i.e., You can split a split**
  Dixon v. State, 912 So.2d 292(Ala.Crim.App. 1/28/05).

- **Out of State DUI Convictions Cannot Be Used For Enhancement Under Alabama's DUI Law.** *Ex parte Bertram*, 2003 WL 857934 (Ala.2003).

- **CC Diversions - A Defendant Can Be Sentenced Directly to Community Corrections.**
  - Or diverted from Prison, with the consent of the judge.
  § 15-18-175, Code of Alabama 1975.

XI. Interesting Facts

The prison overcrowding crisis is real

- **Alabama prisons are operating over 191% of design capacity**
  - The Commissioner of Corrections is under competing court orders to reduce overcrowding and to take in more inmates.
  - No new prisons have been built in Alabama since Bibb Correctional Facility was opened in May of 1998.
  - As of October 2005, there were 2,453 state inmates awaiting transfer to county jail.
  - Inmates sentenced to segregation for prison disciplinary infractions are put on waiting lists for segregation cells.
  - There are inmates are on waiting lists for disciplinary segregation cells and alcohol and substance abuse programs.
  - *Waiting time* for alcohol and substance abuse programs may be *six months*.
- **Alabama uses prison as a punishment option more than almost every other state**
  - Alabama has the 5th highest incarceration rate in the nation.
  - 1 out of every 165 adult Alabama residents are incarcerated.
  - Over the last 30 years the inmate population has increased 600% while the state population has increased only 30%.
  - An average of 10,000 new prisoners are admitted to the Department of Corrections each year.

Small shifts in sentencing practices can have an immediate and large impact

- **Opportunities available to make punishment more effective and more efficient**

  - Additional state funds have been made available for local community corrections programs creating additional beds in local programs for otherwise prison bound offenders or offenders already incarcerated but eligible for community placement.

  - $5.2 million has been made available to expand community corrections throughout the state.

  - Pardons and Paroles has added 28 additional supervision officers with 5 to 10 more being sought to supervise an additional 850 offenders.

  - To maintain prison space for violent offenders, some other states are shortening sentences for low-level property and drug offenses or requiring treatment as an alternative to prison sentences for low-level drug related offenses. Sentences of 9 to 36 months may be shortened by 3 to 6 months without losing effectiveness.

- **Assessing the Impact of Minor Changes in Split Sentencing Practices**

  - Although offenders serving a split sentence do not constitute the majority of inmates in the system, minor changes in sentence lengths can have a substantial impact. For example, Alabama would have an additional 500 prison beds in five years if judges adopted the following recommendations.

Normal Sentence (in months)	New Recommended Sentence (in months)
9-12	9
13-18	12
19-24	18
25-30	24
31-36	30

Alabama relies too heavily on prison

- Alabama is second only to Alaska in the percentage of offenders undergoing drug or alcohol rehabilitation.

- As of September 1, 2005 Alabama had 2,431 inmates in substance abuse treatment programs.
- 80 Counselors provided treatment.
- 128 inmates were on waiting list for substance abuse programs

- One out of five new admissions is for drug possession or felony DUI.
  - 98% of felony DUI offenders report a history of alcohol abuse but only 50% report prior alcohol abuse treatment.
  - 80% of drug offenders report a history of substance abuse but only 28% report a history of substance abuse treatment.

Drug Courts as an alternative

- 16 of Alabama's 67 counties have established Drug Courts.
- 15 of the established Drug Courts serve adult offenders.
- Drug Courts handle both felonies and misdemeanors but primarily felonies.
- Offenders contribute to the cost of the programs.
- In Jefferson County, drug court graduates are 35% less likely to be rearrested in one year than like offenders who chose not to participate.
- Drug Courts utilize court referral officers in 9 of the 16 programs, some in conjunction with community corrections programs.

Community Corrections as an alternative

- 25 programs serving 34 Alabama counties.
- There are 5 programs serving multiple counties"
  - Fayette, Lamar and Pickens
  - 4th Circuit – Bibb, Dallas, Hale, Perry and Wilcox
  - Geneva/Coffee
  - Colbert/Lauderdale
  - Marion/Winston
- Served 1,896 felony offenders last year
- 5,496 felony diversions over the past 5 years.

- Pre-trial release programs reduce local jail overcrowding.

- In FY 07 DOC is requesting $5.5 million in state funding for community corrections to divert felons who would otherwise be prison bound.

General Information: Who is in prison active inmate population

- 27,842 offenders reported by DOC – 877 of these are in Community Correction Programs, therefore the stock population is actually 26,965

- 73% (over 20,000) for new offenses.

- 27% probation (21%) and parole (6%) revocations, (1/2 for technical violations).

- 44 % drug and property offenders (over 12,000).

- 61% violent offenders (includes burglary and trafficking).

- Over 1/3 serving split sentences.

- 7,312 inmates are serving sentences of 5 years or less, more than 2/3 of these for property and drug offenses (6/30/03).

- During FY 05 Alabama spent $2,345,310 to house female inmates in private prison located in Louisiana.

Alabama's investment per inmate in its Department of Corrections system is substantially less than other states.

- Alabama's prison system has the lowest annual cost per inmate in the nation.
  - Alabama spends $12,063 per year ($32.96 per inmate per day)
  - National average $31,073

Community based punishment is less costly and more effective for some offenders

Per day costs	
Department of Corrections	$32.96
Pardons & Paroles Transition Centers (proposed)	$12.82
Community Corrections	$10.33
Probation or Parole	$ 2.27

Offenders in prison are less likely to pay restitution, court costs or supervision fees whereas community placed offenders pay both.

During 2005, 38% of the inmates released from prison had no community based supervision or re-entry assistance.